

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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4 The State of Minnesota,

5 by Hubert H. Humphrey, III,

6 its attorney general,

7 and

8 Blue Cross and Blue Shield

9 of Minnesota,

10 Plaintiffs,

11 vs. File No. C1-94-8565

12 Philip Morris Incorporated, R.J.

13 Reynolds Tobacco Company, Brown &

14 Williamson Tobacco Corporation,

15 B.A.T. Industries P.L.C., Lorillard

16 Tobacco Company, The American

17 Tobacco Company, Liggett Group, Inc.,

18 The Council for Tobacco Research-U.S.A.,

19 Inc., and The Tobacco Institute, Inc.,

20 Defendants.

21 - - - - -

22 DEPOSITION OF ANDREW H. TISCH

23 Volume II, Pages 287 - 463

24

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1 (The following is the continued deposition
2 of ANDREW H. TISCH, taken pursuant to Notice of
3 Taking Deposition, at the offices of Dorsey &
4 Whitney, Attorneys at Law, 250 Park Avenue, New York,
5 New York, on October 1, 1997, commencing at
6 approximately 8:38 o'clock a.m.)

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23

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25

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1 I N D E X

2 EXHIBITS DESCRIPTION PAGE MARKED

3 Plf Ex 1268 Memo dated September 25,

4 1978, Lewis to Engel, no Bates

5 numbers, six pages 325

6 1269 "ABSTRACT" dated 4-3-80, no

7 Bates numbers, two pages 331

8

9 WITNESS EXAMINATION BY PAGE

10 Andrew H. Tisch Mr. Finzen 292

11 Mr. Monica 380

12 Mr. Gottlieb 385

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1 P R O C E E D I N G S

2 (Witness previously sworn.)

3 ANDREW H. TISCH

4 called as a witness, being previously
5 sworn, was examined and testified
6 as follows:

7 ADVERSE EXAMINATION (cont'd)

8 BY MR. FINZEN:

9 Q. Good morning, Mr. Tisch.

10 A. Good morning.

11 Q. I remind you that you are still under oath
12 today.

13 Did you discuss your testimony from yesterday
14 with anyone since you left the room yesterday?

15 A. Other than my counsel?

16 Q. With anyone.

17 A. I discussed it with my counsel.

18 Q. Anyone other than counsel?

19 A. No.

20 Q. Did you review any documents between yesterday
21 afternoon and today?

22 A. No.

23 Q. When we concluded yesterday, we had been looking
24 at Plaintiffs' Exhibit 304.

25 MR. FINZEN: Do we have the exhibits from

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1 yesterday?

2 (Documents handed to the witness.)

3 THE REPORTER: They're in the order they
4 were used.

5 MR. FINZEN: So that should be on the
6 bottom then; is that correct?

7 THE REPORTER: I believe so. The last
8 exhibit.

9 A. That's the B.A.T. --

10 Q. Yes.

11 A. -- Limited document?

12 Q. Yes.

13 And my question is: At any time up until you
14 testified at the Waxman hearing in April of 1994, did
15 you see any kind of a publication or advertisement
16 taken out, of the type that the Frank Statement
17 represented, by the tobacco industry, setting forth
18 that people in the industry believed that smoking
19 caused lung cancer?

20 MR. WACHTELL: Objected to as vague and
21 ambiguous.

22 A. I'm not following the connect between Exhibit
23 304 and the question.

24 Q. Well as you will recall there were statements
25 written in Plaintiffs' Exhibit 304 that the authors

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1 believed that the people in the industry with whom
2 they had met felt that it was established that
3 smoking caused lung cancer. Do you recall that?

4 MR. WACHTELL: You want to direct us to the
5 language you're talking about, Bruce?

6 MR. FINZEN: Sure. On page --

7 MR. WACHTELL: Could we wait a minute,
8 please, so we can locate the exhibit?

9 (Discussion off the stenographic record.)

10 MR. WACHTELL: I have it now, thanks.

11 Where, Bruce?

12 MR. FINZEN: Turn to the third page of the
13 document, has page number two at the top.

14 Q. Under "'CAUSATION' OF LUNG CANCER" in the
15 middle of the page, do you see that?

16 A. Yes.

17 Q. At any time before you testified --

18 MR. WACHTELL: What -- which portion are
19 you referring to?

20 MR. FINZEN: Under the heading
21 "'CAUSATION' OF LUNG CANCER."

22 MR. WACHTELL: Right. And what -- what
23 portion under the heading of "LUNG CANCER?"

24 MR. FINZEN: The first sentence there.

25 Q. At any time prior to your testimony in April of

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1 1994, had you seen an industry publication of the
2 type that the Frank Statement represented, stating
3 that individuals in the industry believed that
4 smoking causes lung cancer, if by causation we mean
5 any chain of events which leads finally to lung
6 cancer and which involves smoking as an indispensable
7 element?

8 MR. WACHTELL: Yeah. I object to the form
9 of the question in that it mischaracterizes the
10 document. The word "CAUSATION" in the document is in
11 quotes. And you also refused yesterday to read the
12 next sentence, which would make clear what was being
13 talked about.

14 MR. FINZEN: Go ahead and answer.

15 MR. WACHTELL: Also vague and ambiguous.

16 Q. Have you ever seen an advertisement taken out by
17 the industry setting that forth?

18 A. Not to my recollection.

19 Q. Did you ever see an ad taken out by the industry
20 setting forth anything along those lines, not those
21 exact words, anything to that effect?

22 MR. WACHTELL: Object to the question as
23 vague and ambiguous.

24 A. Not to my recollection.

25 Q. At any time up until you testified before the

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1 Waxman Committee, had you seen an advertisement taken
2 out by the industry of the type that the Frank
3 Statement represented that said that the industry
4 believed that the human epidemiological data add up
5 to a reasonably convincing case that tobacco smoke is
6 weakly carcinogenic?

7 A. Not that I can recall.

8 Q. Have you seen, however, over the years before
9 your testimony, statements from The Tobacco
10 Institute, the Tobacco Industry Research Committee,
11 CTR, any of those organizations that said the case
12 involving smoking and health is not proved?

13 MR. WACHTELL: In words or substance?

14 MR. FINZEN: Yes.

15 A. I believe in words -- in words or substance,
16 yes.

17 Q. Or that the question of smoking and health was
18 just that, a question or a controversy, have you seen
19 advertisements taken out by the industry setting that
20 forth up until the time of your Waxman testimony?

21 MR. WACHTELL: You just changed from
22 statements to advertisements, so it's a different
23 question.

24 MR. FINZEN: Yes.

25 MR. WACHTELL: Which -- which is it? Is it

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1 statements or is it advertisements?

2 MR. FINZEN: I asked the question --

3 The question is what the question is, Herb.

4 MR. WACHTELL: Okay. But just -- when you
5 started "or that the," and then you switch from
6 "statements" to "advertisements," you're -- you're
7 implying that you're asking the same question with a
8 different subject matter, and now you're asking a
9 different question.

10 MR. FINZEN: Do you understand the
11 question?

12 THE WITNESS: What -- what's the question?

13 Q. Have you seen at any time up until your
14 testimony before the Waxman Committee advertisements
15 taking out -- taken out by the industry stating that
16 the question of smoking and health was just that, a
17 question or a controversy?

18 A. I believe I have.

19 Q. And to your knowledge, did Lorillard subscribe
20 to those statements or advertisements of the
21 industry, that the question of smoking and health had
22 not been proved?

23 MR. WACHTELL: Object to the form of the
24 question as vague and ambiguous.

25 A. I believe that Lorillard ascribed to the idea

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1 that there was a controversy.

2 Q. Had you ever seen any evidence that executives
3 at Lorillard did not believe that the charges linking
4 smoking with cancer and other diseases were invalid
5 and unsupportable?

6 MR. WACHTELL: Hold it a second. You
7 got -- that --

8 That question is incomprehensible; you've got
9 two negatives in there. Can you please rephrase it?

10 MR. FINZEN: No, I can't.

11 Can you answer the question?

12 Herb, we're not going to do this today. We're
13 really not going to do this.

14 MR. WACHTELL: If you are going --

15 MR. FINZEN: If you have an objection,
16 state it.

17 MR. WACHTELL: I'm objecting to the
18 question as incomprehensible. I'm asking you to
19 rephrase it. You've got a double negative in there.
20 The question is incomprehensible.

21 MR. FINZEN: You can object to the
22 question, and if -- he's the one who will tell me the
23 question's incomprehensible.

24 MR. WACHTELL: I didn't direct him -- I
25 didn't direct him not to answer.

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1 MR. FINZEN: I understand that, But
2 you're -- you're --

3 MR. WACHTELL: You're saying that
4 incomprehensible is not permitted but vague and
5 ambiguous is? Please.

6 MR. FINZEN: Please yourself. What I'm
7 saying is the witness can tell me --
8 Q. Will you please tell me, sir, when you don't
9 understand a question I ask and want me to rephrase
10 it? Will you do that? If you don't understand it,
11 will you ask me to rephrase the question?
12 A. I will.

13 MR. FINZEN: All right. With that
14 understanding, you may state your objection, but if
15 you don't understand it it doesn't matter because
16 you're not answering it. It matters that the witness
17 understands it.

18 MR. WACHTELL: Yeah, I think it matters
19 that the question is incomprehensible. I respect to
20 differ with you, Bruce. We have a record here, we
21 want to have a good record; I assume you do, I do.
22 And if you ask a question that is incomprehensible,
23 I'm going to point it out. If you don't choose to
24 rephrase it, it's your prerogative.

25 MR. FINZEN: I'll ask the question again.

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1 Q. Have you ever seen any evidence that executives
2 of Lorillard did not believe that the charges linking
3 smoking and cancer and other diseases were invalid
4 and unsupportable?

5 MR. WACHTELL: Same objection.

6 A. The -- the question is incomprehensible. Can
7 you rephrase it?

8 Q. Let me show you what's been previously marked in
9 this litigation as Plaintiffs' Exhibit 1236. This is
10 a letter on Lorillard letterhead dated October 19,
11 1962 from Lewis Gruber to Bowman Gray, and it bears
12 Bates numbers 92463273 through 3274.

13 Have you seen this document before?

14 A. No, I don't believe so.

15 Q. On October 19th, 1962, the letterhead says that
16 Lewis Gruber was the chairman of the board of
17 Lorillard. Do you have that understanding, that
18 Lewis Gruber served as chairman of the board of
19 Lorillard in the early 1960s?

20 A. That's my understanding, that he -- I --

21 I don't know exactly when, but I know that the
22 name Lewis Gruber was familiar to me.

23 Q. In the letter in the first paragraph to Mr.
24 Gray, who was chairman of the board at R. J.
25 Reynolds, it says, "Last week I received from you a

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1 copy of the letter which Paul Hahn wrote you in which
2 he expressed his views in connection with the
3 recommendation that the Tobacco Industry should state
4 its position in paid advertising copy, which was
5 discussed at the joint meeting of the Executive
6 Committees on October 3." See that?

7 A. Uh-huh. Yes.

8 Q. He then goes on, the third paragraph says, "I
9 have given this subject careful consideration since
10 our meeting of October 3, and" --

11 A. Just give me a chance to read the intervening
12 lines, --

13 Q. Sure.

14 A. -- if I may.

15 Okay, I'm up to you now.

16 Q. It says, "I have given this subject careful
17 consideration since our meeting of October 3, and
18 have come to the conclusion that for the present it
19 would be inappropriate and inadvisable for the
20 industry to run paid advertising in an attempt to
21 explain the industry's position to the public. I
22 think Bill Cutchins very ably rationalized the
23 problem in his letter when he wrote" --

24 (Telephone rings.)

25 THE REPORTER: Just a moment.

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1 (Discussion off the stenographic record.)

2 THE REPORTER: Off the record, please.

3 (Discussion off the record.)

4 BY MR. FINZEN:

5 Q. Looking at Plaintiffs' Exhibit 1236, in the
6 third paragraph Mr. Gruber writes, "I have given this
7 subject careful consideration since our meeting of
8 October 3, and have come to the conclusion that for
9 the present it would be inappropriate and inadvisable
10 for the industry to run paid advertising in an
11 attempt to explain the industry's position to the
12 public. I think Bill Cutchins very ably rationalized
13 the problem in his letter when he wrote:

14 "If we were able to make strong, affirmative,
15 well-documented statements which might tend to
16 convince the public that the charges against our
17 industry are invalid and insupportable, I would
18 subscribe wholeheartedly to a series of paid
19 advertisements in which we could tell our story. But
20 since we cannot take such a position, et cetera, et
21 cetera..."

22 Next paragraph, he says, "I believe that paid
23 advertisements which would satisfy all of us,
24 including our respective legal counsel and litigation
25 counsel, parents, and which would still remain firm

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1 and positive rather than negative or defensive, close
2 parens, would be almost impossible to arrive at." Do
3 you see that?

4 A. Yes.

5 Q. Does the statement made by Mr. Gruber tell you
6 that as of October 1962, he believed that the charges
7 against the industry were not invalid and
8 insupportable?

9 MR. WACHTELL: Object to the form of the
10 question as vague and ambiguous, lacking foundation.
11 You may answer.

12 A. It doesn't say that to me.

13 Q. He certainly makes it clear that he doesn't
14 think advertisements to the public with regard to
15 smoking and health are appropriate; correct?

16 MR. WACHTELL: Object to the form of the
17 question, vague and ambiguous, without foundation,
18 and I think it mischaracterizes the document.

19 A. Question please?

20 Q. He certainly makes it clear that he doesn't
21 think advertisements to the public with regard to
22 smoking and health are appropriate; correct?

23 A. I don't believe it says that.

24 Q. He wasn't in favor of public advertisements in
25 1962; was he?

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1 MR. WACHTELL: Excuse me. You're asking
2 this witness to characterize a document written in
3 1962 that he has never seen. I mean how -- how --
4 how is he supposed to know what this person has in
5 mind?

6 MR. FINZEN: If you have --

7 MR. WACHTELL: Argumentative.

8 MR. FINZEN: If you have an objection,
9 state "Objection."

10 MR. WACHTELL: Argumentative, vague and
11 ambiguous, lacks foundation, speculative.

12 A. I -- I can't characterize his feelings as that
13 it was appropriate or not appropriate.

14 Q. Well, if Lorillard endorsed the advertisements
15 that said the question of smoking and health is not
16 proved or is still a question, do you know what
17 changed between October of 1962 and when those
18 advertisements ran at any time after that?

19 MR. WACHTELL: Object to the form of the
20 question, lacks foundation, mischaracterizes the --
21 the document.

22 A. I do not know.

23 Q. Are you familiar with the work that was done by
24 Lorillard with Dr. Wynder?

25 A. No, I am not.

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1 Q. Are you familiar with any research work that was
2 done by Lorillard with Dr. Homburger?

3 A. No, I am not.

4 Q. At any time before --

5 A. Not -- not to my -- not to my recollection.

6 Q. At any time before you testified before the
7 Waxman Committee, had anybody at Lorillard told you
8 that Lorillard had engaged in animal research with
9 outside scientist consultants?

10 MR. WACHTELL: Object to the form of the
11 question as vague and ambiguous.

12 A. They may have.

13 Q. Do you recall who told you that?

14 A. I -- I just recall being somewhat familiar
15 that -- I --

16 I can't even characterize it, as to what it --
17 what it was, but I have no idea who -- who would have
18 told me.

19 Q. Do you recall whether you were aware at any time
20 before you testified that -- at the Waxman hearing
21 that Lorillard had done mouse skin-painting tests
22 with outside consultants?

23 MR. WACHTELL: The question --

24 Object to the form of the question as vague and
25 ambiguous.

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1 A. I -- I believe that I knew that Lorillard did
2 some animal testing and possibly mouse -- mouse
3 skin-painting testing, but I wasn't sure -- I don't
4 remember what the reasons were.

5 Q. Had anyone ever told you what the findings were
6 of any animal skin-painting testing that Lorillard
7 had done in the past?

8 A. Not to my recollection.

9 Q. Let me show you what's been previously marked in
10 this litigation as Plaintiffs' Exhibit 1239. This is
11 a memorandum from H. B. Parmele to Mr. M. J. Cramer,
12 president, dated June 22, 1964, and it bears Bates
13 numbers 01182410 through 411.

14 Have you seen this document before?

15 A. I don't believe I have.

16 Q. Do you know who H. B. Parmele is?

17 A. The name is vaguely familiar. I believe that he
18 was Dr. Spears' predecessor in research.

19 Q. And do you know who M. J. Cramer is?

20 A. No. It purports here that he's president.

21 Q. Do you have any information that there ever was
22 someone by the name of M. J. Cramer who was president
23 at Lorillard?

24 A. No, I don't.

25 Q. On the second page of this memorandum, at Roman

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1 numeral III, about the middle of the page, Mr.
2 Parmele writes, "Dr. Wynder and, unknown to him, Dr.
3 Homburger have both found that eighty to ninety per
4 cent of the mouse tumorigenic properties of cigarette
5 tar resides in a fraction of the tar known as
6 fraction, quote, B, close quote. This fraction makes
7 up only 2 percent of the tar by weight but it is
8 extremely potent on the backs of mice. Our chemists
9 have split fraction, quote, B, close quote, into
10 three subfractions. One is made up of an assortment
11 of terpenes, several of which have been identified;
12 another consists of an assortment of esters and many
13 of the acids and alcohols in these esters have been
14 determined; while the third and last subfraction
15 contains pericyclic hydrocarbons, including
16 benzopyrene. However, in the last fraction our
17 chemists" --

18 MR. WACHTELL: "In this last fraction."
19 Q. "...in this last fraction our chemists have also
20 found a significant amount of DDD, a chlorinated
21 hydrocarbon insecticide. This could be a very
22 important discovery since, even if the insecticide is
23 not a carcinogen itself, it might act as a promoter
24 for the small quantities of benzopyrene. Dr. Wynder
25 is not aware of the presence of the insecticide but

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1 he has agreed to test the three subfractions in a
2 somewhat superficial way to see if any of these --
3 any of them possess promoting -- possesses promoting
4 properties. This will take five to seven months. In
5 the meantime I would like to have pure DDD tested as
6 a promoter in approximately the quantities found in
7 cigarette smoke. I would prefer to have Dr.
8 Homburger do this since, if we disclose our ideas to
9 Dr. Wynder, he will give them premature publicity.
10 This could be a very important breakthrough and I
11 would like to discuss our next move with you as soon
12 as convenient." Do you see that?

13 A. Yes.

14 Q. Before your testimony at the Waxman hearing, had
15 anyone talked with you about -- anyone at
16 Lorillard -- about the fact that there were
17 carcinogens in the smoke of cigarettes?

18 MR. WACHTELL: Object to the form of the
19 question as lacking foundation in the document.

20 A. Not that I can recall.

21 Q. Had you ever heard of a fraction of cigarette
22 smoke referred to as fraction B?

23 A. I do not believe so.

24 Q. Had you ever heard of benzopyrene?

25 A. I believe I had.

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1 Q. And from whom did you hear about benzopyrene?

2 A. I believe from Dr. John Slade at a Loews
3 Corporation annual meeting.

4 Q. And who is Dr. Slade?

5 A. Dr. Slade is a shareholder of Loews.

6 Q. And what did Dr. Slade tell you about
7 benzopyrene?

8 A. That it was a component of smoke, and I believe
9 he characterized it as being dangerous.

10 Q. Did you go back and talk with Dr. Spears or
11 anyone else at Lorillard after your -- your
12 conversation with Dr. Slade?

13 MR. WACHTELL: He didn't say he had a
14 conversation with Dr. Slade.

15 A. I did not -- not have a conversation.

16 Q. How did you hear it if it wasn't in a
17 conversation?

18 A. It was a question raised to the board, raised to
19 the -- to the chairman.

20 Q. All right. After the question by Dr. Slade at
21 the Loews meeting, did you go back and talk with Dr.
22 Spears or anyone else at Lorillard about what Dr.
23 Slade had said?

24 A. I believe I did.

25 Q. With whom did you speak?

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- 1 A. I believe I spoke to Dr. Spears.
- 2 Q. And did Dr. Spears confirm that benzopyrene was
- 3 in cigarette smoke?
- 4 A. I -- I believe I put Dr. Spears in touch with
- 5 Dr. Slade.
- 6 Q. Did he confirm to you, however, that what Dr.
- 7 Slade said was correct, that benzopyrene does exist
- 8 in cigarette smoke?
- 9 A. I forget what -- what he told me.
- 10 Q. You have no recollection?
- 11 A. I have no recollection.
- 12 Q. At any time before your testimony at the Waxman
- 13 Committee hearing, were you aware of a substance
- 14 known as DDD?
- 15 A. No, I was not.
- 16 Q. Were you at any time before your testimony at
- 17 the Waxman hearing aware of the term "cancer
- 18 promoter?"
- 19 A. In reference to cigarettes?
- 20 Q. In reference to cigarettes, yes.
- 21 A. No, I do not believe I was.
- 22 Q. Were you aware of a term with reference to
- 23 cigarettes, a "cancer initiator?"
- 24 A. I do not believe I was.
- 25 Q. To your knowledge, at any time up until the day

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1 that you testified at the Waxman hearing, had
2 Lorillard taken out any public advertisements setting
3 forth to the public the fact that there were both
4 cancer initiators and promoters in cigarette smoke?

5 MR. WACHTELL: Object to the form of the
6 question as lacking foundation.

7 A. Not to my knowledge.

8 Q. To your knowledge, up until the day that you
9 testified at the Waxman hearing, had Lorillard ever
10 taken out an advertisement of the kind that the Frank
11 Statement represents telling the public that they --
12 they, the company, Lorillard -- had redone the mouse
13 smoke skin-painting tests of Dr. Wynder and confirmed
14 his results?

15 A. Not to my knowledge.

16 Q. At any time up until you testified, had
17 Lorillard taken out an advertisement of the type that
18 the Frank Statement represents saying that they had
19 confirmed Dr. Wynder's mouse skin-painting tests with
20 cigarette smoke condensate with another doctor, Dr.
21 Homburger?

22 A. Not to my knowledge.

23 Q. Do you believe that the failure to advise the
24 public of the confirmation of carcinogens in smoke
25 condensate in mouse skin-painting experiments

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1 violates the pledge in the Frank Statement?

2 MR. WACHTELL: Object to the form of the
3 question as -- as lacking foundation and asking this
4 witness for opinion testimony. He's here as a fact
5 witness.

6 MR. MONICA: And I object on the bases it
7 calls for a legal conclusion, assumes a fact not in
8 evidence.

9 A. Could you repeat the question, please?

10 Q. Yes.

11 Do you believe that the failure to advise the
12 public of the confirmation of carcinogens in smoke
13 condensate in mouse skin-painting experiments
14 violates the pledge in the Frank Statement?

15 A. I don't know.

16 Q. Do you think that the failure to advise the
17 public that the mouse skin-painting condensate
18 experiments had been rerun and confirmed makes the
19 Frank Statement a false promise?

20 MR. WACHTELL: Object to the --
21 Same objections.

22 MR. MONICA: Same objections here.

23 A. I don't know that it's a false promise.

24 Q. On the first page of Plaintiffs' Exhibit 1239,
25 under Roman II, in that -- in that paragraph there is

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1 a reference in the middle sentence that starts
2 "Formic..."

3 A. Will you let me read the first sentence to
4 myself, please?

5 Q. Surely.

6 A. Okay.

7 Q. The sentence I'm looking at starting "Formic..."
8 says, "Formic, Acetic and proprionic acids are
9 ciliatotoxic and it has been shown in a preliminary way
10 that, when these acids are reduced in the smoke, the
11 cilia are benefited." See that?

12 A. Yes.

13 Q. At any time before you testified at the Waxman
14 hearing, had anyone at Lorillard told you that there
15 were any components in cigarette smoke that were
16 ciliatotoxic?

17 A. I don't believe so.

18 Q. Had you ever, before your testimony at the
19 Waxman Committee, been advised that formic, acetic
20 and proprionic acids were present in cigarette smoke?

21 A. I don't believe so.

22 Q. Turning over to the top of the second page, in
23 the carryover paragraph --

24 A. Can I --

25 Let me finish this paragraph --

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1 Q. Certainly.

2 A. -- so I can have some continuity.

3 Okay.

4 Q. The first paragraph on the top of page two says,
5 "Certain low molecular weight aldehydes, such as
6 formaldehyde, display ciliastatic properties and it
7 was decided to try to do something about reducing
8 their occurrence in smoke by using a white compressed
9 filter made from cellulose acetate flakes impregnated
10 about sodium bisulphite, a chemical which reacts very
11 readily with aldehydes." Do you see that?

12 A. Uh-huh.

13 Q. At any time prior to your testimony at the
14 Waxman hearing, had anyone at Lorillard told you that
15 low-molecular-weight aldehydes were existent in
16 cigarette smoke?

17 A. I do not believe so.

18 Q. Had anyone discussed with you the impact of
19 having cilia in the lung paralyzed and what that
20 meant to their normal function in the human lung?

21 MR. WACHTELL: Object to the form of the
22 question as lacking foundation and vague and
23 ambiguous.

24 A. I -- I don't believe so.

25 Q. Did you have any knowledge at all about whether

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1 damage to cilia in the lungs was an adverse health
2 event for a human being?

3 A. No, I did not.

4 Q. At any time before you testified, were you aware
5 of how many chemicals existed in the cigarette smoke
6 of a -- of a cigarette?

7 A. I was aware that there were a lot of components
8 in cigarette smoke.

9 Q. Were you aware from any source before your
10 testimony at the subcommittee in April of 1994 that
11 any of the chemicals in cigarette smoke were
12 recognized as carcinogenic?

13 MR. WACHTELL: Object to the form of the
14 question as vague and ambiguous.

15 A. I -- I don't --

16 I don't know.

17 Q. You just don't recall or -- or --

18 A. I don't -- I don't believe I did, but I'm -- I
19 can't be a thousand percent sure.

20 Q. Were you aware of the knowledge that Dr. Spears
21 had with regard to the contents of cigarette smoke?

22 MR. WACHTELL: I think that question is
23 vague and ambiguous. Was he aware that he was
24 knowledgeable, or was he aware of the specifics of
25 the knowledge? What's the question?

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1 Q. Were you aware that he had any knowledge about
2 the components of cigarette smoke?

3 A. I believed that he had -- had knowledge of a
4 lot -- a lot of different things about cigarettes.

5 Q. Before you testified at the Waxman hearing, did
6 you go to Dr. Spears and ask him to give you any kind
7 of a primer on the toxicity of cigarette smoke?

8 A. I don't believe I did.

9 Q. Did he come to you and offer to give you a
10 science lesson on the chemical content of cigarette
11 smoke?

12 A. I don't believe he did, no.

13 Q. Did you see any research memoranda at any time
14 while you were CEO of Lorillard that purported to
15 address what the chemical components were of
16 cigarette smoke?

17 A. I don't recall seeing any.

18 Q. Let me show you what's been previously marked in
19 this litigation as Plaintiffs' Exhibit 1240. It is a
20 Lorillard internal report titled "A REVIEW OF ANIMAL
21 STUDIES CONDUCTED AT BIO-RESEARCH CONSULTANTS INC AND
22 THE SLOAN-KETTERING MEMORIAL INSTITUTE," submitted by
23 Spears, A.W., dated May 25, 1966, bears Bates numbers
24 81577610 through 625.

25 Have you seen this document before?

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1 A. I don't believe I have.

2 Q. Turn, if you would, please, to page five of the
3 document.

4 By the way, let me -- let me for the record say
5 that the second page is a letter addressed to J. E.
6 Bennett, president, dated May 25, 1966, from A. W.
7 Spears. Do you know who Mr. Bennett was?

8 A. Well it says here he was president of P.
9 Lorillard Company.

10 Q. Did you have independent knowledge that a J. E.
11 Bennett was president of Lorillard at some point in
12 time?

13 A. I might have. The name is not unfamiliar.

14 Q. The subject of the letter is "A Review of Animal
15 Studies Conducted at Bio-Research Consultants, Inc.
16 and the Sloan-Kettering Memorial Institute," and in
17 the first paragraph Dr. Spears writes, "During the
18 past decade, the Research Division of P. Lorillard
19 Company, Inc., has been investigating the tumorigenic
20 properties of cigarette smoke condensate toward mouse
21 epithelium through cooperative studies with Dr.
22 Wynder, of the Sloan-Kettering Memorial Institute,
23 and on a consulting basis with Bio-Research
24 Consultants, Inc."

25 Were you aware from any source at any time while

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1 you were at Lorillard as CEO that this kind of mouse
2 epithelium work had been done by Lorillard?

3 A. Well I was aware that we had done -- when --

4 When you say "mouse epithelium," I presume that
5 you're talking about mouse skin-painting studies.

6 MR. WACHTELL: I'm not -- I'm not sure
7 you're presuming correctly.

8 Q. Well were you aware of mouse skin-painting
9 studies at any time while you were CEO?

10 MR. WACHTELL: Asked and answered.

11 A. I answered that, that I was.

12 Q. And what was the -- the source of that
13 knowledge?

14 MR. WACHTELL: Asked and answered.

15 A. I believe it was a general review of the
16 research department budget, that they were
17 undertaking studies of ingredients.

18 Q. Turn, if you would, please, to page five of
19 the -- of the letter, has page five at the top. Do
20 you have that?

21 A. Yes.

22 Q. In that what appears to be the first full
23 paragraph at the top of the page there, in about the
24 middle, Dr. Spears writes, "Of the known carcinogens
25 in fraction B" --

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- 1 A. Let me get up to speed here.
- 2 Q. Sure.
- 3 Okay?
- 4 A. Okay.
- 5 Q. Dr. Spears writes, "Of the known carcinogens in
6 fraction B and fraction B1, benz(a)pyrene is well
7 known. From the curve shown in figures 6 and 8 it
8 may be seen that 10 percent B fraction produces about
9 the same tumorigenic response as .005 percent
10 benz(a)pyrene. Using this data and the concentration
11 of benz(a)pyrene found in fraction B, it may be
12 estimated that fraction B is 13 times more active
13 than can be expected from the concentration of
14 benz(a)pyrene contained therein." Do you see that?
- 15 A. Yes.
- 16 Q. Were you aware at any time before your testimony
17 at the Waxman hearing that there was a chemical in
18 smoke known as benz(a)pyrene?
- 19 MR. WACHTELL: Asked and answered.
- 20 A. I believe I already answered that.
- 21 Q. The last one we saw had -- had it with an "o,"
22 benzopyrene, this is with an "(a)."
- 23 A. I -- I never saw the spelling of the -- of the
24 term.
- 25 Q. Do you understand if there's a difference

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1 between benzopyrene with an "o" or with an "(a)?"

2 A. I have no idea.

3 Q. At the bottom of page five and over to the top
4 of page six, Dr. Spears writes a summary. See that?

5 A. Yes.

6 Q. And number one he says, "The total tumorigenic
7 effect of cigarette smoke to mouse epithelium is due
8 to both carcinogens and promoters." See that?

9 A. Yes.

10 Q. Did he at any point while you were CEO of the
11 company share that information with you?

12 A. Not that I can remember.

13 Q. Summary paragraph two he says, "The carcinogens
14 represent about 60 percent of the total effect and
15 have been concentrated in a subfraction of cigarette
16 smoke representing 0.5 percent of the total weight."

17 At any time while you were CEO of the company,
18 did Dr. Spears share that information with you?

19 A. Not that I can remember.

20 Q. In the third summary paragraph he says, "The
21 promoters represent about 40 percent of the total
22 effect."

23 At any time while you were CEO of the company,
24 did Dr. Spears share that information with you?

25 A. Not that I can remember.

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1 Q. In the fourth paragraph Dr. Spears writes, "Two
2 subfractions of cigarette smoke contain promoters,
3 hyphen, parens, 1, close parens, the acidic and
4 phenolic fraction, and, parens, 2, close parens, the
5 neutral fraction. The neutral fraction is the
6 strongest promoter of the subfractions isolated to
7 date."

8 At any time while you were CEO of the company,
9 did Dr. Spears share that information with you?

10 A. Not that I can remember.

11 Q. He then says in numbered paragraph five, "The
12 definition of individual compounds responsible for
13 the tumorigenic effect of cigarette smoke is far from
14 complete, but the information gained in the last few
15 years has clarified many aspects of the complex
16 response of mouse epithelium to cigarette smoke.
17 Continued investigation should ultimately give a
18 definition of this response in terms of specific
19 components of cigarette smoke." See that?

20 A. Yes.

21 Q. Do you know whether additional work was
22 conducted, either inside of Lorillard or with outside
23 consultants, into smoke components after May of
24 1966?

25 MR. WACHTELL: Object to the question as

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1 vague and ambiguous.

2 A. I -- I don't know specifically.

3 Q. Do you know whether investigation at any point
4 in time did define the specific components of
5 cigarette smoke in their entirety?

6 MR. WACHTELL: Object to the question as
7 vague and ambiguous.

8 A. I don't -- I don't know.

9 Q. Are you aware of any public advertisement of the
10 type that the Frank Statement represented that was
11 taken out by Lorillard -- Lorillard, up to the date
12 of your testimony at the Waxman hearing, that
13 contained any of the information set forth in Dr.
14 Spears' summary on pages five and six of Exhibit
15 1240?

16 MR. WACHTELL: Object to the question as
17 vague and ambiguous, lacking foundation, and
18 misleading in that you have not called to the
19 attention of the witness or put on the record other
20 portions of Dr. Spears' letter which puts the summary
21 in context.

22 A. Will you repeat the question, please?

23 Q. Yes, sir.

24 Are you aware of any public advertisement of the
25 type that the Frank Statement represented that was

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1 taken out by Lorillard up to the date of your
2 testimony at the Waxman hearing that contained any of
3 the information set forth in Dr. Spears' summary on
4 pages five and six of Exhibit 1240?

5 MR. WACHTELL: Same objection.

6 A. I don't know.

7 Q. Do you know whether the research that had been
8 undertaken by Lorillard that Dr. Spears is reporting
9 upon here had been undertaken for the purpose of
10 determining whether warnings should be given to
11 cigarette smokers?

12 A. I don't know what -- what the purpose of the
13 research was.

14 Q. Had you ever heard that the purpose of the
15 research that had been done into the components of
16 cigarette smoke was with an attempt to find a way to
17 remove certain components that may be implicated in
18 adverse smoking-and-health consequences to consumers?

19 A. I -- I forget what the characterization of the
20 studies were. I may have known at -- that at some
21 point.

22 Q. You have no knowledge today one way or the
23 other --

24 A. That's correct.

25 Q. -- as you sit here today?

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1 A. That's correct.

2 Q. Have you ever heard anybody express that there
3 could be significant commercial potential in a
4 cigarette from which components that were alleged to
5 be harmful to humans were removed?

6 A. No, but it would stand to reason.

7 Q. Do you know whether Lorillard ever was
8 successful in removing components from its cigarette
9 smoke that were linked in any way to human disease?

10 MR. WACHTELL: Object to the form of the
11 question as vague and ambiguous and overbroad.

12 A. I do not know.

13 Q. Do you know whether today Lorillard cigarette
14 products have all carcinogens removed from them?

15 MR. WACHTELL: Object to the form of the
16 question as lacking foundation, vague and ambiguous
17 and overbroad.

18 A. I'm sorry, what --

19 Q. Do you know whether today Lorillard's cigarette
20 products have all carcinogens removed from them?

21 A. I do not know.

22 Q. At the same time that Lorillard was contending
23 publicly that the question of smoking and health was
24 a -- an open question or a controversy, isn't it true
25 that another Loews subsidiary, CNA, was charging

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1 smokers more than non-smokers for life insurance
2 premiums?

3 A. Can you give me a date reference on that,
4 please?

5 Q. Yes. In the late 1970s.

6 A. I don't remember when CNA started its smoker
7 versus non-smoker pricing policy. I don't -- I don't
8 recall when.

9 MR. FINZEN: Would you --

10 That's (referring to a court reporter's
11 identification sticker) not yours, is it?

12 THE REPORTER: No.

13 MR. FINZEN: Would you mark this next,
14 please.

15 A. And I can tell you CNA did start charging
16 different rates for smokers and non-smokers at some
17 point.

18 (Plaintiffs' Exhibit 1268 was marked
19 for identification.)

20 BY MR. FINZEN:

21 Q. Showing you now what's been marked as
22 Plaintiffs' Exhibit 1268, it is a memorandum with CNA
23 letterhead dated -- dated September 25, 1978 from S.
24 H. Lewis to P. L. Engel, re, "NON-SMOKERS DISCOUNT,"
25 and it has not been Bates numbered.

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1 Have you seen this document before?

2 MR. MONICA: Bruce, was this

3 predesignated?

4 MR. FINZEN: Yes.

5 MR. MONICA: Is this on the -- excuse me.

6 Was this on the separate list for --

7 MR. FINZEN: Supplemental.

8 MR. MONICA: Supplemental list?

9 MR. FINZEN: Yes.

10 A. I don't believe I've seen -- that I've seen

11 this.

12 Q. Do you know who S. H. Lewis is?

13 A. No. But from the top here, it's Stephen H.

14 Lewis, assistant vice-president of CNA.

15 Q. Do you know who P. L. Engel is?

16 A. I believe that's Phil Engel, who is one of the

17 top executives of CNA today.

18 Q. In September of 1978 was CNA Insurance a

19 subsidiary of Loews?

20 A. Yes.

21 Q. And at that point in time Lorillard Tobacco was

22 also a subsidiary of Loews?

23 A. That is correct.

24 Q. In the introduction portion of this memo Mr.

25 Lewis writes, "This memorandum sets forth the

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1 recommendation for CNA to employ a non-smokers
2 premium discount with its new portfolio individual
3 life term insurance products." See that?

4 A. Yes.

5 Q. Then turning over to page three, at the very
6 bottom of page three, --

7 A. Yes.

8 Q. -- the last sentence that carries over to page
9 four says, "There are several criteria which could be
10 used to define a preferred class, including build,
11 blood pressure and family history. However,
12 non-smoking is the only one for which there is
13 satisfactory evidence that a strong correlation with
14 mortality experience exists." See that?

15 A. Yes.

16 Q. And then in the next section titled "SUPPORT FOR
17 NON-SMOKING CRITERIA," he writes, "The Surgeon
18 General's Report On Smoking provides considerable
19 statistical evidence that smoking cigarettes has a
20 significant bearing on mortality experience. The
21 results of seven prospective studies indicate that
22 the age adjusted death rate for smokers of cigarettes
23 who were smoking at the time of entry is about 70
24 percent higher than for non-smokers. Of particular
25 relevance to life insurance, one of these studies

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1 indicates that among those with no previous serious
2 disease, the death rate for smokers was almost double
3 that for non-smokers.

4 "More importantly, these results apparently hold
5 true not only for the general population, but also
6 for the very select population which has been issued
7 life insurance at standard rates. State Mutual began
8 using a non-smokers discount more than 10 years ago.
9 Consequently, they have a considerable amount of
10 experience data. We have recently learned that their
11 mortality experience supports the findings of the
12 general population studies contained in the Surgeon
13 General's report." Do you see that?

14 A. Yes.

15 Q. As of the time of the testimony at the Waxman
16 hearing, were you aware that CNA was charging
17 different rates for smokers and non-smokers in their
18 life insurance products?

19 A. I believe I was.

20 Q. And were you aware of the rate -- of the reason
21 or the basis for their decision to do that?

22 A. I was -- I was aware that there were competitive
23 criteria for them doing so.

24 Q. Were you aware of the -- of the reasons that are
25 set forth on pages three and four that we just looked

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1 at here in Mr. Lewis's memorandum?

2 MR. WACHTELL: Are you limiting it to the
3 ones you have read into the record?

4 MR. FINZEN: Yes. Yes.

5 A. Not specifically.

6 Q. At any time prior to your testimony at the
7 Waxman hearing, had anyone indicated to you that the
8 history of certain insurance companies had proven to
9 be comparative to that of the Surgeon General's
10 statistical data with regard to the higher mortality
11 rates for smokers over non-smokers?

12 MR. WACHTELL: Object to the form of the
13 question as vague and ambiguous, lacking foundation,
14 and it inaccurately characterizes the document.

15 A. Could you repeat the question, please?

16 Q. Yes.

17 At any time prior to your testimony at the
18 Waxman hearing, had anyone indicated to you that the
19 history of certain insurance companies had proven to
20 be comparable to that of the Surgeon General's
21 statistical data with regard to the higher mortality
22 rates for smokers over non-smokers?

23 A. I don't believe so.

24 Q. The information that was reported in this
25 memorandum by Mr. Lewis with regard to State Mutual,

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1 had that been brought to your attention at any time
2 before you testified at the Waxman hearing?

3 A. I do not believe so.

4 Q. When the issue of raising -- I'm sorry.

5 When the issue of -- of having different premium
6 rates for smokers and non-smokers was first raised by
7 CNA, was Lorillard Tobacco brought into the
8 discussion as to whether that should occur or not?

9 MR. WACHTELL: Object to the form of the
10 question as lacking in foundation. Raised by whom,
11 with whom? Vague and ambiguous.

12 A. I -- I believe that there was some, and I'll
13 characterize it as consternation, and I'm -- I'm
14 going by fourth-hand knowledge here, but there was
15 some consternation at the Loews board level where
16 members of the board, including Curt Judge, who is
17 the CEO of Lorillard, and Ed Noha, who I believe was
18 the CEO and chairman of CNA at the time, and from
19 what I understand there was, you know, some -- some
20 discussion about that. I can't characterize the
21 discussion, but knowing the individuals involved, I'm
22 sure it was fairly acrimonious.

23 Q. And have you heard from that discussion that
24 Lorillard attempted to keep CNA from offering
25 different rates for life insurance premiums for

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1 smokers and non-smokers?

2 A. I -- I wouldn't characterize my information as
3 leading to that conclusion.

4 Q. Does your information lead you to the conclusion
5 that Lorillard was opposed to CNA having different
6 rates for life insurance premiums for smokers and
7 non-smokers?

8 A. I'm -- I'm sure that -- that they took that
9 position. I'm sure that Curt took that position.

10 MR. FINZEN: Would you mark this next,
11 please.

12 A. Each one of the companies operates independently
13 of each other.

14 (Plaintiffs' Exhibit 1269 was marked
15 for identification.)

16 BY MR. FINZEN:

17 Q. Showing you now what's been marked as
18 Plaintiffs' Exhibit 1269, has the word "ABSTRACT" at
19 top of the first page, it is a two-page document that
20 contains 10 numbered paragraphs. It has not been
21 Bates numbered.

22 Have you seen this document before?

23 A. No, I have not.

24 Q. There's some handwriting that appears in the
25 upper right of the first page and the lower right of

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1 the second page. Do you recognize that handwriting?

2 A. No, I do not.

3 Q. Turn, if you would, to the second page,

4 paragraph nine. Do you have that paragraph?

5 A. Yes.

6 Q. That paragraph reads, "It is recognized that the
7 introduction of non-smokers discount could prove
8 embarrassing to the Loews Corporation and Lorillard
9 Tobacco Company; to minimize this potential, CNA and
10 Lorillard should jointly prepare a carefully
11 constructed statement pointing out that the
12 introduction of non-smokers discount in no way either
13 supports or refutes the contention that smoking
14 causes health defects, parens, no cause-effect
15 relationship has been proven in clinical studies,
16 close parens; instead, the introduction of discounts
17 merely recognizes mortality differences between
18 classes of smokers and non-smokers." Do you see
19 that?

20 A. Yes.

21 Q. Do you know whether such a carefully worded
22 joint statement between CNA and Lorillard was ever
23 issued?

24 A. I do not know.

25 Q. Were you ever involved, at the time that you

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1 were CEO of -- of Lorillard Tobacco, with the issue
2 of CNA's charging of different rates for smokers and
3 non-smokers?

4 A. That's --

5 I don't understand the question.

6 Q. Okay. Were you ever involved in the issue of
7 CNA charging different rates to smokers and
8 non-smokers in any way while you were CEO of
9 Lorillard?

10 MR. WACHTELL: Object to the form of the
11 question as without foundation and vague and
12 ambiguous, the word "issue."

13 A. If -- if you're asking if I knew that CNA
14 charged different rates for smokers and non-smokers,
15 the answer is yes. If you're asking if -- if I
16 helped to set that policy, the answer is no.

17 Q. Okay. Did you have any involvement in setting
18 policy/not setting policy? Were you involved in any
19 way with CNA charging different rates to smokers and
20 non-smokers while you were CEO?

21 A. No.

22 Q. Did you take any action of any kind to attempt
23 to either change or stop the practice of charging
24 different rates for smokers or non-smokers at CNA?

25 A. No. I -- I have nothing to do with CNA.

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1 Q. When you were not the CEO of Lorillard but had
2 other positions at Loews, were you involved in any
3 way with the setting of CNA rates for smokers and
4 non-smokers?

5 A. No.

6 Q. Do you believe that it is inconsistent for
7 Lorillard to be taking the position that smoking does
8 not cause disease in humans, while CNA is charging
9 different rates to smokers and non-smokers based upon
10 mortality tables showing that smokers die at a much
11 higher rate?

12 MR. WACHTELL: Object to the form of the
13 question as lacking foundation, misleading,
14 mischaracterizes the position that Lorillard has
15 taken and the position that the witness has taken as
16 to whether smoking causes lung cancer, et cetera.

17 Q. Do you remember the question?

18 A. Will you repeat it, please?

19 Q. Sure.

20 Do you believe that it is inconsistent for
21 Lorillard to be taking the position that smoking does
22 not cause disease in humans, while CNA is charging
23 different rates to smokers and non-smokers based upon
24 mortality tables that show smokers die at a much
25 higher rate?

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1 MR. WACHTELL: Same objection.

2 A. No, I don't believe it's inconsistent.

3 MR. WACHTELL: By answering the question,
4 the witness should not be presumed to have adopted
5 your mischaracterization of Lorillard's position.

6 Q. Looking at paragraph ten of Exhibit 1269, it
7 says, "CNA should further refrain from advertising or
8 otherwise promoting non-smoker discounts, except to
9 note in promotions directed toward agents that CNA
10 has non-smoker discounts and except for that
11 promotion implied whenever we promote our low rates
12 to agents." See that?

13 A. Yes.

14 Q. Do you know whether CNA does advertise smoker
15 discounts -- or non-smoker discounts in any of its
16 advertising?

17 A. I do not know that. I believe they do, but I
18 don't know.

19 Q. And is it your understanding that the reason
20 Loews went to the non-smoker discount and charged a
21 different rate in life insurance premiums for smokers
22 and non-smokers was based upon a statistical
23 association between smoking and death rate?

24 MR. WACHTELL: You misspoke, you said
25 "Loews." I assume you meant CNA.

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1 MR. FINZEN: I'm sorry.

2 MR. WACHTELL: And you -- and you
3 previously asked him whether he knew the basis and he
4 gave you his answer, so the question has been asked
5 and answered.

6 Q. Let me rephrase the question.

7 Is it your understanding that the reason CNA
8 went to the non-smoker discount and charged a
9 different rate in life insurance premiums for smokers
10 and non-smokers was based upon a statistical
11 association between smoking and the death rate?

12 MR. WACHTELL: Asked and answered.

13 A. I -- I -- I don't know what the -- what the
14 rationale was for -- for going to the discounts.

15 Q. To your knowledge, up until today has Lorillard
16 ever accepted the epidemiological association between
17 smoking and disease in humans as evidence that
18 smoking causes disease in humans?

19 MR. WACHTELL: Conclusive evidence? Some
20 evidence? Any evidence? What's the question? Vague
21 and ambiguous.

22 MR. FINZEN: You may answer.

23 A. I think I've -- I've already pretty well covered
24 that, but I believe that there is a -- a statistical
25 association between smoking as a risk factor for

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1 cancer. If that's -- if that's what you mean, then
2 the answer is that there is some recognition of that.

3 Q. Has Lorillard ever taken the position up until
4 today that that statistical association establishes
5 that smoking causes disease in humans?

6 MR. MONICA: Objection, vague and
7 confusing, lack of foundation.

8 A. I don't know.

9 Q. Do you have the transcript of the Waxman hearing
10 in front of you there?

11 A. Right here.

12 Q. Turn, if you would, to page 37.

13 Do you recall we looked at this conversation
14 between you and Congressman Waxman yesterday where he
15 asked you whether you believe that smoking causes
16 lung cancer and that you previously said you don't
17 believe so. Do you recall that? Do we need to read
18 this again to get familiar with --

19 A. Just tell me where you're starting from.

20 Q. Starting over at the bottom of page 36.

21 A. Right.

22 Q. Do you have --

23 Do you have that in mind, or do you need to read
24 that?

25 A. Got it.

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1 Q. Your statement at the top of page 37, in
2 response to Congressman Waxman's question, "And what
3 have you done to pursue that interest? Do you see
4 that, where you said, "We have looked at the data and
5 the data we have been able to see has all been
6 statistical data and has not convinced me that
7 smoking causes death." Do you see that?

8 A. Yes.

9 Q. How many epidemiological studies had you seen by
10 the time you testified at the Waxman hearing?

11 MR. WACHTELL: Object to the form of the
12 question as lacking foundation and vague and
13 ambiguous.

14 A. I don't -- I don't remember.

15 You know, first of all, what do you mean by
16 "studies?"

17 Q. Studies showing a statistical association
18 between smoking and disease in humans.

19 MR. WACHTELL: Studies that the witness
20 personally looked at, is that the question?

21 MR. FINZEN: Yes.

22 A. Very few.

23 Q. How many were you aware existed as of the time
24 of your testimony at the Waxman hearing?

25 A. I -- I don't know.

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1 Q. Were you aware that there were more than a dozen
2 such studies?

3 A. I would characterize it as more than a dozen.

4 Q. More than 20?

5 A. Probably.

6 Q. More than 30?

7 A. I would say there --

8 Probably a hundred, several hundred.

9 Q. And it's true, is it not, that all of those
10 studies show a uniform result; that is, a significant
11 increase in the risk of cancer, emphysema, heart
12 disease, death rate in smokers as opposed to
13 non-smokers?

14 A. I believe that's correct.

15 Q. And you understand that ethically scientists and
16 doctors can't do tests of carcinogens on humans,
17 laboratory tests on humans. You understand that;
18 don't you?

19 A. I -- you know, I'm -- I'm not sure what I
20 understand about it, but I understand something to
21 that effect.

22 Q. Isn't it true that the only human experiment
23 that can be done is to take the class of smokers and
24 do the statistical analysis of their rate of death as
25 opposed to non-smokers' rate of death that's been

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1 done in the epidemiological studies?

2 MR. WACHTELL: Object to the form of the
3 question as lacking foundation and misleading.

4 A. I don't know that.

5 Q. Based upon these hundreds of studies, all of
6 whom show a significant increase in these diseases in
7 humans who smoke, what more do you need to see in
8 order to prove to you that smoking causes disease in
9 humans?

10 MR. WACHTELL: That was asked and answered
11 yesterday. You're just retreading ground. He told
12 you very specifically.

13 MR. FINZEN: You may answer.

14 MR. WACHTELL: You're not going to just
15 keep on repeating yesterday's examination; are you?

16 MR. FINZEN: No, I'm not.

17 You may answer.

18 MR. WACHTELL: Well do you want me to find
19 where he testified to this yesterday? This was gone
20 over yesterday. You asked him virtually the same
21 question and he gave you the answer at that time.

22 Q. Well humor me and -- and give me the answer one
23 more time, sir.

24 A. I -- I -- I don't have to humor you.

25 MR. WACHTELL: Well no, you can answer the

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1 question if you -- if you --

2 THE WITNESS: I'd like to see the
3 testimony.

4 MR. WACHTELL: Okay.

5 THE WITNESS: Do you mind?

6 THE REPORTER: Let's go off the record a
7 moment, please.

8 (Discussion off the record.)

9 MR. WACHTELL: There is fairly extensive
10 testimony on the subject starting at page 48 and
11 going on for quite a number of pages after that, and
12 then very, very specifically at page 270 the witness
13 is asked:

14 "And is that still your position today with
15 regard to the question of whether or not smoking
16 causes cancer?

17 "Answer: My position is that I haven't seen the
18 scientific data that can show me the direct link
19 between smoking and death. You know, I can certainly
20 see the statistical relationships, but I have yet to
21 hear of the causal relationship that will allow me to
22 believe -- to believe that if you smoked you would
23 die."

24 I mean that's precisely what you just asked
25 him.

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1 MR. FINZEN: No, it isn't.

2 Q. My question was -- and I will ask it again, and
3 I would like an answer -- based upon these hundreds
4 of studies, all of which show the significant
5 increase in these diseases in humans who smoke, what
6 more do you need to see in order to prove to you that
7 smoking causes disease in humans?

8 MR. WACHTELL: That's precisely what he
9 answered you at page 270. I think that question is
10 asked and answered.

11 MR. FINZEN: You can answer.

12 A. Answer is I don't know what more.

13 MR. WACHTELL: Other than -- other than
14 previously --

15 Q. In order to convince you --

16 MR. WACHTELL: Other than as he previously
17 testified.

18 Q. In order to convince you that smoking causes
19 disease in humans, isn't it fair to say that you
20 would have to see something that showed that 100
21 percent of people who smoked all got sick --

22 MR. WACHTELL: Object to the form of the
23 question, --

24 Q. -- from smoking?

25 MR. WACHTELL: -- vague and ambiguous,

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1 misleading, mischaracterizes the witness's testimony.
2 A. It mischaracterizes my testimony.
3 Q. That's what your counsel just said, but what's
4 your answer?
5 A. It mischaracterizes my testimony. That's not
6 what I said.
7 Q. Is the answer to my question, then, no, you
8 wouldn't need to see a hundred percent of the people
9 getting sick?
10 A. Don't -- don't put words in my mouth, please.
11 I -- I answered you. That's -- that's all I can do.
12 I'm trying to answer you as honestly as I can, and if
13 you're -- if you're going to tell me what I'm
14 thinking, then you're -- you're seriously mistaken.
15 Q. So your answer is you -- you just don't know
16 what more you'd need to see?
17 A. I don't know.
18 Q. Okay. Turn to page 62 of the transcript.
19 MR. WACHTELL: This is the transcript of
20 1226?
21 MR. FINZEN: Of the April 24th, 1994
22 hearing.
23 MR. WACHTELL: 1226, right?
24 MR. FINZEN: Exhibit 1226, correct.
25 Q. Representative Synar -- is that how you

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1 pronounce it, Synar? -- is talking with Mr. Johnston
2 there, and in the middle of the page he says, "No,
3 that's not what I'm suggesting, Mr. Johnston. That's
4 not up to your determination what is reasonable. I'm
5 asking, will you and will every one of the gentlemen
6 to your right provide all animal research data to
7 this committee that's presently or in previous
8 research been done, and reports, notes, et cetera?
9 Mr. Johnston?"

10 And then he goes around the table, and at the
11 bottom of page 63 and the top of page 64 he asks
12 you -- or -- or Congressman Waxman says, "Mr. Tisch?"

13 And you say, "Yes, sir. We will provide to
14 Congress whatever is appropriate and required by law,
15 sir." Do you see that?

16 A. Yes.

17 Q. Do you know whether any of the animal studies
18 that were performed by Drs. Wynder and Homburger were
19 provided to the subcommittee?

20 A. I do not know.

21 Q. When you got back to your office after the
22 hearing, did you instruct anyone to gather together
23 all of the animal studies that Lorillard had done and
24 turn them over to the Waxman subcommittee?

25 A. I believe I asked our legal counsel to provide

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1 whatever we had agreed to and whatever was
2 appropriate.

3 Q. And did you follow up with counsel to determine
4 whether that request had been carried out?

5 A. I know that discussions continued and there were
6 submissions made.

7 Q. Do you know whether any of the animal studies
8 that had been performed by Drs. Wynder and Homburger
9 were turned over to the Waxman Committee?

10 A. I believe I already answered that.

11 Q. The answer is you don't know?

12 A. That is correct.

13 Q. Did you --

14 A. I do not know.

15 Q. Did you get a -- an index from any source of the
16 information that was turned over by Lorillard to the
17 Waxman Committee following the hearing?

18 A. I do not believe I did, no.

19 Q. Do you know when any of the information that was
20 turned over was actually turned over to the
21 committee, when in time?

22 A. I don't -- I don't know specifically, but it was
23 a matter of -- I believe it was a matter of months.

24 I'm not -- I'm not sure.

25 Q. Do you know what the volume of material was that

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1 was turned over?

2 A. I do not.

3 Q. Having been --

4 A. Let -- let me -- let me restate that. I -- I

5 know that we continued to work with the committee. I

6 don't know what was turned over.

7 Q. Having been the individual who testified under

8 oath that materials would be turned over, didn't you

9 have an interest in making certain that everything

10 you had committed to turn over was in fact turned

11 over?

12 MR. WACHTELL: Object to the form of the

13 question as vague and ambiguous and calling for a

14 legal conclusion.

15 You can answer.

16 A. I -- I have very competent counsel --

17 I had very competent counsel at Lorillard, and I

18 trust -- I trusted then that and trust now that

19 everything that should have been turned over was

20 turned over.

21 Q. Do you know whether or not any of the CNA data

22 with regard to the mortality rates of smokers versus

23 non-smokers was ever made available to the Waxman

24 Committee?

25 MR. WACHTELL: Object to the form of the

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1 question as without foundation, and mischaracterizes
2 the CNA documents to which you previously referred.

3 Q. And I'm not limiting that just to the documents
4 we've seen, I'm asking you whether any CNA data of
5 any kind with regard to the difference in mortality
6 rates between smokers and non-smokers was ever made
7 available to the Waxman Committee.

8 MR. WACHTELL: Bruce, we haven't seen any
9 CNA data, we've seen CNA referring to other people's
10 data. I think your question mischaracterizes the
11 documents you've shown the witness.

12 MR. FINZEN: And I just told you, my
13 question is not limited --

14 MR. WACHTELL: I understand.

15 MR. FINZEN: -- to those documents.

16 MR. WACHTELL: But you keep on saying that
17 there is CNA data, and I think you're
18 mischaracterizing. If you want to ask him whether
19 any CNA data was turned over, ask that question.

20 MR. FINZEN: That's exactly what I asked
21 him.

22 A. I don't know if any CNA data was turned over.

23 Q. In 1994 when you testified, CNA had had almost
24 14 years of experience of their own with regard to
25 the mortality rate of its insureds who were smokers

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1 and non-smokers; correct?

2 MR. WACHTELL: I --

3 A. You're -- you're presuming that the non-smoker
4 discounts were put in in 1979?

5 Q. In -- in 1979, 1980.

6 A. Mathematics would indicate that's correct.

7 Q. Had you ever been made aware, in any position
8 that you've had at Loews, what the CNA mortality data
9 showed over time with regard to the difference in
10 rate of mortality between smokers and non-smokers
11 that were its insureds?

12 A. I don't believe I have.

13 Q. Has anyone ever told you what that data showed?

14 A. I don't believe so.

15 Q. Does CNA continue to charge different rates for
16 smokers and non-smokers in its premium structure
17 today?

18 A. I believe it does.

19 Q. Is it a fair assumption that if their mortality
20 rate over the course of 14 years did not confirm that
21 there was a different mortality rate between smokers
22 and non-smokers, that they would have discontinued
23 the practice of charging different rates?

24 MR. WACHTELL: Object to the question as
25 calling for speculation and lacking foundation.

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1 A. I don't know.

2 Q. Well based upon your knowledge of the way in
3 which Loews businesses are run, certainly they would
4 not charge a different premium that was higher to an
5 individual if there was no basis for doing so; would
6 they?

7 MR. WACHTELL: Object to the question as
8 argumentative.

9 A. I think that if there were market pressures,
10 they might charge different premiums.

11 Q. They wouldn't charge a premium, however --

12 A Loews business wouldn't charge a premium that
13 it was not entitled to; would it?

14 MR. WACHTELL: Object to the form of the
15 question as vague and ambiguous and argumentative,
16 and lacks foundation.

17 A. I don't -- I don't understand -- I don't --

18 I don't know what you mean by that.

19 Q. Well if -- if they are charging some people more
20 than others, they wouldn't continue to do that, a
21 Loews business wouldn't continue to do that if there
22 wasn't a valid reason for doing it; would they, sir?

23 A. I -- I don't know what you mean by "a Loews
24 business."

25 Q. CNA.

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1 A. CNA is not a Loews business.

2 Q. CNA is no longer a subsidiary of Loews?

3 A. CNA is -- I --

4 I would not characterize CNA as a Loews
5 business.

6 Q. Is -- is it a subsidiary of Loews?

7 A. It is a subsidiary. It's not necessarily --

8 It's not a hundred-percent-owned subsidiary, so
9 it --

10 Q. Would the Loews management that oversees CNA
11 permit CNA to charge a premium to a smoker that was
12 higher than a non-smoker if there was no rational
13 basis or reason for doing so?

14 MR. WACHTELL: Object to the form of the
15 question. There's so many mispremises in that
16 question it's hard to know where to start. The
17 question lacks foundation, question is misleading,
18 question is vague and ambiguous.

19 A. I don't know how to answer that question.

20 MR. FINZEN: Why don't we take a break.

21 MR. WACHTELL: Good.

22 THE REPORTER: Off the record, please.

23 (Recess taken.)

24 BY MR. FINZEN:

25 Q. Mr. Tisch, do you recall at the Waxman Committee

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1 hearing being asked by Congressman Wyden about your
2 position on youth smoking?

3 A. I do, but if you can refresh my recollection
4 in --

5 Q. Turn to page 109 of the transcript of the Waxman
6 hearing. See at the bottom of the page
7 Representative Wyden is asking, I think, each of the
8 CEO's --

9 A. I see it here.

10 Q. Do you recall giving the testimony that appears
11 at the bottom of page 109 where you say, "Mr. Wyden,
12 I have stated in the past, and I truly believe that
13 smoking is an adult's" -- apostrophe s that is --
14 "decision. I've got a 16-year-old son who is sitting
15 in this room today, and I have told him in the past
16 that I would prefer that -- first of all I don't want
17 him to make that decision until he's 18 years old,
18 and that when he's 18 years old, I want him to make a
19 fully informed decision based on all the information
20 available."

21 Representative Wyden says, "Mr. Tisch, with all
22 due respect, the question I'm asking you --

23 "MR. TISCH: May I finish?

24 "REP. WYDEN: Please.

25 "MR. TISCH: I think I will get to your

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1 question very quickly, and I would prefer that he not
2 smoke."

3 Do you see that?

4 A. That's correct. I see that.

5 Q. And did you take that position in response to
6 Congressman Wyden's question because you love your
7 son and you know that smoking causes diseases and you
8 don't want him to get any of those diseases?

9 A. Did I say that smoking -- I --

10 I took that position then and now that smoking
11 is an adult decision, it's a decision that should be
12 made by adults, and when I look at all the
13 statistical data and see the statistical
14 correlations, you know, there are certain risks that
15 I don't want him to necessarily -- him to necessarily
16 take, and, you know, may be smoking, it may be car
17 racing, it may be drinking, and I want him to -- to
18 make decisions based on an evaluation of all the
19 risks that are involved.

20 Q. But as I understand your testimony, what you
21 told Congressman Wyden is that even when he's old
22 enough to make those decisions as an adult, it would
23 be your preference that he not smoke; is that
24 correct?

25 MR. WACHTELL: Asked and answered.

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1 A. That's correct.

2 Q. Do you know what the statistics are on how many
3 young people under the age of 18 start smoking every
4 day in this country?

5 A. I do not recall the stats offhand.

6 Q. Have you heard ever the figure that
7 approximately 3,000 youth under the age of 18 start
8 smoking every day in America?

9 A. I've heard that figure, yes.

10 Q. And are you familiar with government statistics
11 over time that indicate that approximately two-thirds
12 of all people who are smokers begin smoking before
13 the age of 18?

14 A. I believe I've heard that.

15 Q. And while you were CEO at Lorillard, were you --
16 (clearing throat) excuse me -- aware of those
17 statistics?

18 A. I may have been.

19 Q. And while you were the CEO at -- at Lorillard,
20 were you aware that Newport, your leading brand, was
21 smoked primarily by a younger or a more youthful
22 group of smokers?

23 MR. WACHTELL: Object to the question as
24 vague and ambiguous, and --

25 MR. MONICA: I -- I object, --

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1 MR. WACHTELL: -- lacking foundation,
2 counsel.

3 MR. MONICA: -- lacks foundation and
4 assumes a fact not in evidence.

5 MR. FINZEN: You may answer.

6 A. I was aware that, on the demographic scale, that
7 Newport is skewed more heavily among the 21- to
8 35-year-old smokers.

9 Q. And while you were CEO of the company, were you
10 aware that one of Lorillard's employees wrote the
11 president of -- of the company in 1978 and said that
12 the base of the Newport business was the high-school
13 student?

14 MR. MONICA: Again object to lack of
15 foundation, assumes a fact not in evidence.

16 A. I was made aware of such a document recently.
17 I'm not sure if I was aware prior to that.

18 Q. Let me show you what has been previously marked
19 in this litigation as Plaintiffs' Exhibit 1244. This
20 is a document on Lorillard letterhead that's a
21 memorandum dated August 30, 1978 from T. L. Achey --

22 A. That's Achey.

23 Q. Achey.

24 -- to Mr. Curtis Judge, it bears Bates numbers
25 03537131 through 7132.

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1 Have you seen this memorandum before?

2 A. I don't believe I have.

3 Q. In the third paragraph of this memorandum, Mr.

4 Achey --

5 Is that correct?

6 A. That's correct.

7 Q. -- says, "The success of NEWPORT has been

8 fantastic during the past few years. Our profile

9 taken locally shows this brand being purchased by

10 black people, parens, all ages, close parens, young

11 adults, parens, usually college age, close parens,

12 but the base of our business is the high school

13 student." Do you see that?

14 A. I see that.

15 Q. And then in the next paragraph Mr. Achey says,

16 "NEWPORT in the 1970's is turning into the Marlboro

17 of the 60's and 70's. It is the, quote, In, close

18 quote, brand to smoke if you want to be one of the

19 group."

20 During the period of time that you were the CEO

21 of the company, did you have information from any

22 source that the base of the Newport business was

23 high-school students?

24 MR. MONICA: Objection, vague and

25 confusing.

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- 1 A. I don't believe I did.
- 2 Q. Do you know who Mr. Achey is?
- 3 A. Yes.
- 4 Q. Who is he?
- 5 A. Mr. Achey was one of our sales executives.
- 6 Retired a few months ago.
- 7 Q. Within the last several months?
- 8 A. Within the last year.
- 9 Q. When you were at the company in the early 1970s
- 10 in sales and marketing, did you know Mr. Achey then?
- 11 A. I believe I did.
- 12 Q. Do you recall that he was the sales manager for
- 13 the Minneapolis region during the period of time when
- 14 you were with the company in the early 1970s?
- 15 A. I forget what --
- 16 I forget what his position was. I believe he
- 17 lived in Minneapolis at some point in his career.
- 18 Q. Do you know whether he lived in Minneapolis
- 19 during 1978?
- 20 A. I would presume not because the letter was
- 21 written from the Lorillard office in Mt. Laurel, New
- 22 Jersey, and Field 3 is -- if I remember correctly,
- 23 Field 3 -- 3 was New Jersey.
- 24 Q. And that, you're -- you're seeing the address on
- 25 the bottom of the first page of Exhibit 1244 saying

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1 that it was written from Mt. Laurel?

2 A. That's correct.

3 Q. And that is the location of the Field 3 sales
4 office?

5 A. I -- it's --

6 It's not any more. I don't know if it ever was,
7 but I would just presume from the letterhead that it
8 was.

9 Q. Let me show you what's been previously marked in
10 this litigation as Plaintiffs' Exhibit 1004. This is
11 an organizational chart. In the upper right it says
12 "LOEWS CORPORATION, TABLE OF ORGANIZATION, LORILLARD
13 SALES FIELD CHART Roman IX-E-3, JUNE, 1974," with a
14 series of numbers under that, bears Bates number
15 00000016.

16 Have you seen this document previously?

17 A. I don't believe I have.

18 Q. If you look on the left-hand side under
19 "REGIONAL SALES MANAGER, A." -- looks like --

20 A. Giacoia.

21 Q. Giacoia?

22 A. Yeah.

23 Q. Below that in field two it says "MINNEAPOLIS
24 FIELD MANAGER, T. Achey." Do you see that?

25 A. That's correct.

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1 Q. Is that the same T. L. Achey that wrote
2 Plaintiffs' Exhibit 1244?

3 A. Yes, I believe it is.

4 Q. And do you know what his position was in
5 Minneapolis in June of 1974?

6 A. He was obviously field manager.

7 Q. What is the --

8 What is the field manager position? What does
9 that entail?

10 A. Field manager --

11 There are at various points in time anywhere
12 from 16 to 20 fields, which are specific geographies
13 in the United States for which the field manager has
14 responsibility.

15 Q. Do you know what the number of salespeople were
16 that were in each field, or did it -- did it vary
17 from field to field?

18 A. It varied from field to field, but it -- there
19 were anywhere from six to nine divisions in each
20 field. Each division may have -- might have had
21 anywhere from five to 10 sales reps. So there were
22 probably anywhere from 60 to 80 -- 55 to 80 sales
23 reps under each field manager to -- reporting to
24 either division managers or assistant division
25 managers.

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1 Q. And in terms of the structure or organization,
2 then, the salespeople would report to division
3 managers that would then report to the field manager?
4 A. Who would then report to --
5 Q. The regional?
6 A. -- what was then called the regional sales
7 manager, is now called a, I believe, sales manager.
8 Q. And --
9 A. Who would --
10 Q. -- then --
11 A. Who would then report to the general sales
12 manager.
13 Q. Okay. And was it your understanding that in
14 August of 1978, Curtis Judge was the president of
15 Lorillard?
16 A. That's my --
17 Yes, that's correct.
18 Q. Do you know how large a geographic area the
19 Minneapolis region encompasses, or did, at least, in
20 1974?
21 A. I -- I --
22 MR. WACHTELL: The question --
23 Is the question 1974?
24 MR. FINZEN: Yes, if he has knowledge of
25 how large that region was in 1974.

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1 A. I -- I don't recall how large it was. I -- I
2 probably --

3 I'm sure I knew at the time how large it was.
4 But, you know, it certainly would have encompassed
5 the state of Minnesota, might have encompassed parts
6 of Wisconsin and possibly North and South Dakota.
7 I'm not -- I'm not sure.

8 Q. Are you aware that in an effort to keep young
9 people from starting to smoke, Secretary Califano
10 from Health, Education & Welfare asked cigarette
11 manufacturers in 1979 to devote a reasonable portion
12 of their advertising budget to a special campaign
13 aimed at teenagers and children and educating them
14 about smoking?

15 A. I -- I might have been aware of that.

16 Q. Let me show you what has been previously marked
17 in this litigation as Plaintiffs' Exhibit 1248. This
18 is a document, the first page of which has a list of
19 several names, most of which are crossed off, and a
20 second page which is a letter from Joseph A.
21 Califano, Jr., to Mr. C. I. McCarty, Chief Executive
22 Officer of Brown & Williamson Tobacco. The letter at
23 the top bears a date of April 26, 1979, and it has
24 another date stamped below that and to the right of
25 April 30, 1979, and the document Bates numbers are

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1 660008955 through 8956.

2 A. Is the letter dated that, or is that just
3 another date stamp?

4 Q. I believe -- I'm not certain. I believe that's
5 a date stamp, but there are two dates, both in April
6 of 1979.

7 A. Okay.

8 Q. Have you ever seen this letter before?

9 A. I don't believe so.

10 Q. Through any source, while you were CEO of
11 Lorillard, were you made aware that in the past
12 Secretary Califano had asked the tobacco
13 manufacturers to contribute up to 10 percent of the
14 industry's advertising and promotion budget to a
15 program aimed at keeping teenagers and children from
16 beginning smoking?

17 A. I don't believe I was aware of that.

18 Q. Do you know whether any --

19 A. This was --

20 This was 1979. I did not take over as CEO for
21 another ten years.

22 Q. I understand that.

23 Do you know whether any of the manufacturers did
24 provide any part of their advertising budget to
25 Secretary Califano or to any program that was run by

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1 Health, Education & Welfare to keep children from
2 beginning smoking?

3 A. I don't know.

4 Q. Do you recall during the subcommittee hearing
5 that Congressman Synar asked each CEO to help finance
6 a special sting operation at the state and local
7 level to catch people who were selling cigarettes
8 illegally to minors?

9 A. You'd have to refresh my recollection from the
10 transcript.

11 Q. Turn, if you would --

12 Turn, if you would, please, to page 139 of the
13 transcript of the Waxman hearing. See near the
14 bottom of the page, Representative Synar says, "The
15 question is since you are also committed to keeping
16 cigarettes out of the hands of minors, will you
17 commit to this subcommittee that you will help
18 finance the sting operations to try to catch minors
19 who may be doing it?" Do you see that?

20 A. Yes.

21 Q. Do you remember, having seen that, the context
22 of the -- the discussion about the program that
23 Representative Synar was talking about?

24 A. Vaguely, yes.

25 Q. If -- if not, there's -- it's described somewhat

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1 more above that, if you will -- if you'd like to look
2 at that for background.

3 A. Where does it start?

4 Q. Ah --

5 A. Is that on page 138, Mr. Synar, "All right?"

6 Q. Yes. Talking about the Synar Amendment, and
7 going over to the part that I just read.

8 A. Right. Okay.

9 Q. And did you understand that the program that
10 Representative Synar was talking about was to be a
11 state-run program of sting operations aimed at retail
12 cigarette distributors who were selling to under-age
13 youth?

14 A. I believe I understood that.

15 Q. And if you go over to the top of -- of page 140,
16 your response is given about five lines from the
17 top:

18 "MR. TISCH: No, sir."

19 MR. WACHTELL: I'm not sure you can take
20 that out of context from what comes before.

21 Q. Reading on from the part that I just read
22 earlier where he says will you commit to the
23 subcommittee you will help finance the sting
24 operations -- do you see that on page 139?

25 A. Yes.

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1 Q. Mr. Johnston says, "I'm not sure what the" --
2 And Representative Synar says, "Will you help
3 provide the money for the sting operations on the
4 state level by which to enforce the law?"
5 "MR. JOHNSTON: I'm not sure that additional
6 financing is required other than the revenues that
7 are already generated --
8 "REP. SYNAR: No.
9 "Mr. Sandefur?
10 "REP. SYNAR: Mr. Horigan?
11 "MR. HORIGAN: I don't see that's our role.
12 "REP. SYNAR: Thank you. Mr. Tisch?
13 "MR. TISCH: No, sir."
14 See that?
15 A. Yes.
16 Q. And do you recall that that was the answer
17 that -- that you gave, that Lorillard would not
18 provide funding for that program?
19 A. That --
20 That's the answer I gave.
21 Q. And was there any manufacturer present whose CEO
22 said that they would fund it?
23 A. I don't believe so, but I'm --
24 I'd have to read the whole transcript, but I --
25 I don't believe so.

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1 Q. And yet certainly the position that you at
2 Lorillard took was that young people under the age of
3 18 should not smoke, correctly -- or correct?

4 A. That's correct.

5 Q. Do you know how much money Lorillard spent on
6 any efforts directed at keeping young, under-age
7 smokers from starting to smoke?

8 MR. WACHTELL: When?

9 MR. FINZEN: While you were CEO of the
10 company.

11 MR. WACHTELL: The question is vague and
12 ambiguous and overbroad.

13 A. Some money was spent.

14 Q. Do you know how much?

15 A. I don't know exactly how much.

16 Q. Let me show you what has -- let me give that one
17 to the witness -- has previously been marked in this
18 litigation as Plaintiffs' Exhibit 602A.

19 MR. MONICA: For the record, Bruce, I think
20 portions of that report --

21 Of Mr. Much; right?

22 MR. FINZEN: Yes.

23 MR. MONICA: -- contain information --
24 Confidential Category I information from other
25 defendants, and so are you just going to direct his

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1 attention --

2 MR. FINZEN: Yes.

3 MR. MONICA: -- to the Lorillard section?

4 MR. FINZEN: That's what I'm going to do as
5 soon as I identify it for the record.

6 Q. This is a report by Paul J. Much from Houlihan,
7 Lokey, Howard & Zukin, dated July 1997 and submitted
8 as an expert report in this case, and I would ask
9 you, sir, to turn to the tab that is labeled A, I
10 believe, near the -- near the last third of the
11 document. There should be an A tab.

12 A. There's one in the --

13 Is that the one that leads off "Advertising, R&D
14 and Youth Prevention."

15 Q. Yes, and it has "Lorillard" on the bottom?

16 A. Yes.

17 Q. Yes. And across the top there should be a
18 series of date columns beginning with 1954?

19 A. That's correct.

20 Q. Referring to the Lorillard column at the -- or
21 figures at the bottom of the page, at the bottom of
22 the left-hand side there is a line that is labeled
23 "Advertising, Marketing and Promotion Expenditures."
24 See that?

25 A. Yes.

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1 Q. And below that there is a line that is labeled
2 "Youth Prevention Expenditures," and it is broken
3 down between youth prevention expenditures and youth
4 prevention expenditures through TI. Do you see that?

5 A. Right.

6 Q. And then below that "Total Youth Prevention
7 Expenditures?"

8 A. Right.

9 Q. I will represent to you that the figures that
10 appear in the lines that are labeled "Advertising,
11 Marketing and Promotion Expenditures" and "Youth
12 Prevention Expenditures" were provided to the
13 plaintiffs in this litigation by Lorillard. All
14 right?

15 A. Okay.

16 Q. Take a look, if you would, please, three
17 pages -- three pages beyond the page we are looking
18 at, and it has at the far right-hand side a date
19 column totals for 1954 through 1994.

20 A. Right.

21 Q. Do you see that?

22 If you go down to the line --

23 A. There's a -- there's a yellow tab here -- yellow
24 note. Do you want that?

25 Q. Yeah, that shouldn't be on the exhibit.

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1 (Post-it handed to Mr. Finzen.)

2 Q. Thank you.

3 On the line under the 1954-1994 time period, if
4 you look at the line for advertising, marketing and
5 promotion expenditures, what appears there is the
6 total of all of those time periods for that 40-year
7 period that shows \$4,773,843,387. Do you see that?

8 MR. WACHTELL: What page are you on?

9 MR. FINZEN: It would be the third page
10 after the one we were looking at.

11 MR. WACHTELL: Third page after, I come to
12 a circle -- a pie chart.

13 MR. FINZEN: Let me --

14 MR. WACHTELL: Maybe you can find it for
15 me, Bruce.

16 MR. FINZEN: Sure. I'm sorry, that -- that
17 is the fourth page.

18 MR. WACHTELL: Oh, that is the page.

19 MR. FINZEN: Yes.

20 MR. WACHTELL: Okay. Thank you.

21 Q. Do you see that figure?

22 A. Yes.

23 Q. And then under youth prevention, the total youth
24 prevention expenditures are 1,335,511.

25 A. Yes.

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1 Q. If you look back on this page to the 1989, '90,
2 '91, '92, '93, '94 time period, those were the years
3 when you were the CEO of the company; is that
4 correct?

5 A. That's correct.

6 Q. And do you have any independent recollection of
7 the budget for advertising and youth prevention that
8 is different from the figures that are shown on this
9 page for those years?

10 MR. WACHTELL: Object to the question as
11 vague and ambiguous and compound. And there are no
12 specific figures. I mean there are certain figures
13 on these years, but not for the years you just
14 specified in your question. So I think it's -- I
15 think there's a lack of premise.

16 MR. MONICA: Bruce, I'm going to also
17 object on the basis that it's vague and confusing in
18 that this is your expert's report, and I -- I do
19 understand that he based it on some interrogatory
20 answers that were answered by Lorillard, but he took
21 figures from those answers and he assembled them and
22 arranged them and manipulated them to some extent,
23 and I think that that makes this document vague and
24 confusing if you're representing that it is nothing
25 more than what Lorillard has reported in its

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1 interrogatory answers as its various types of
2 expenditures, and I object for that reason.

3 Q. Looking at the year 1990, that was the first
4 full year that you were CEO of the company; correct?

5 A. That is correct.

6 Q. The number listed for advertising, marketing and
7 promotion expenditures in that date is \$333,338,000.
8 Do you see that?

9 MR. WACHTELL: Where -- where -- where are
10 you looking? Which page?

11 MR. FINZEN: On the same page we were
12 looking at under the column 1990.

13 MR. WACHTELL: The page you just referred
14 me there is the column 1990-1994. Are you now going
15 back to a different page? I think you may be
16 flipping between pages. That's what's confusing me.
17 I don't have a 1990 page on the page you referred me
18 to -- I don't have a 1990 column on the page you
19 referred me to.

20 MR. FINZEN: There you go.

21 MR. WACHTELL: Are these not Bates
22 numbered?

23 Oh, this is your report. I'm sorry. Okay.

24 Thank you. I appreciate it.

25 BY MR. FINZEN:

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1 Q. Do you see the column for 1990?

2 A. Yes.

3 Q. And the figure for advertising, marketing and
4 promotion expenditures, \$333,338,000?

5 A. Yes.

6 Q. Do you have any independent recollection of the
7 amount spent by Lorillard on advertising, marketing
8 and promotion for that year being any different from
9 this number?

10 MR. WACHTELL: Object to the form of the
11 question, vague and ambiguous.

12 A. I don't have any -- any other recollection.

13 Q. And under the youth prevention column for 1990,
14 it shows full youth prevention expenditures, all of
15 which went through The Tobacco Institute, of
16 \$95,823. Do you see that?

17 A. Yes.

18 Q. Do you have any independent recollection of a
19 different figure being expended by Lorillard on youth
20 smoking prevention expenditures for that year?

21 MR. WACHTELL: Object to the form of the
22 question, vague and ambiguous.

23 A. Not that I can remember.

24 MR. WACHTELL: Lacking foundation.

25 Q. Do you have --

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1 Looking at the years, then, '91 through '94,
2 same question: Do you have any independent
3 recollection of the figures for advertising,
4 marketing and promotion for any of those years that
5 are different from those shown on this document?

6 MR. MONICA: Object to this whole line of
7 questioning as being vague and confusing. You're
8 saying if he has any independent recollection if
9 they're different. I object because that assumes he
10 has any independent recollection, and I object on
11 that ground.

12 MR. FINZEN: Okay. You may answer.

13 A. I don't have any independent recollection of any
14 different numbers.

15 Q. Let me show you now what's been previously
16 marked in this litigation as Plaintiffs' Exhibit
17 1249. This is an exhibit that takes the figures that
18 we see in the total column 1954 to 1994 for
19 advertising, marketing and promotion and youth
20 prevention expenditures and shows them at the top of
21 the page in the top box. Do you see that?

22 A. Uh-huh.

23 Q. And then in the box below that it -- there's a
24 calculation performed where the total youth
25 prevention expenditures are divided by the total

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1 advertising, marketing and promotion expenditures to
2 obtain a fraction. Do you see that?

3 A. Yes.

4 MR. MONICA: Bruce, I -- I'd like to make
5 an objection here that this document, as I
6 understand, was not predesignated, but that in Dr.
7 Spears' deposition, or -- I think it was Dr. Spears'
8 deposition, we agreed that you can use it anyway.
9 And it has not been designated in this deposition,
10 but I assume you're asking for the same --

11 MR. FINZEN: Yes. It's a summary of the
12 document that was designated; same data that's
13 there.

14 MR. MONICA: I will give you that
15 agreement. But may we establish on the record that
16 this, again, is from Mr. Much's work? This is his
17 work?

18 MR. FINZEN: Correct.

19 MR. MONICA: Your expert witness.

20 MR. FINZEN: That's correct. This is a
21 summary of the data that is shown in the 1954-1994
22 column on Exhibit 602A.

23 MR. MONICA: Thank you.

24 BY MR. FINZEN:

25 Q. And in the bottom box on this exhibit there is a

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1 calculation dividing the total youth expenditures in
2 that time period by the total advertising, marketing
3 and promotion expenditures to obtain a fraction. Do
4 you see that?

5 A. Yes.

6 Q. And then to give that fraction some meaning, the
7 multiplication of the fraction by \$10,000 is done at
8 the bottom. Do you see that?

9 MR. WACHTELL: Object to the form of the
10 question, that it presumes that it's giving it any
11 meaning.

12 Q. Do you see that?

13 A. Yes.

14 Q. And what that calculation shows is that during
15 the period 1954 to 1994, for every \$10,000 that
16 Lorillard spent on advertising, marketing and
17 promotion, the company spent \$3.30 on youth
18 prevention expenditures. Do you see that?

19 A. Where -- where do you see that?

20 Q. The very bottom of the page.

21 A. I think we have a different calculation then.

22 MR. WACHTELL: Ours is less.

23 Q. I'm sorry. Did I hand you the wrong --

24 I'm sorry, I handed you the wrong document,
25 sir.

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1 MR. MONICA: Also, I'm -- I'm going to
2 object to this, this line of questioning, in that it
3 is vague and confusing, there's a lack of foundation,
4 assumes facts not in evidence, and I guess you're
5 purporting to get the witness to go along with your
6 expert's computations, which the witness does not
7 know what they mean, nor do we, and I object for all
8 those reasons.

9 Are you --

10 MR. FINZEN: Did I --

11 MR. MONICA: Are you withdrawing this
12 exhibit?

13 MR. FINZEN: Yes. And in its place, I am
14 handing you what has been previously marked as
15 Exhibit 1249.

16 MR. REILLY: I thought the last one was
17 1249.

18 MR. MONICA: Yeah. We're having a little
19 bit of confusion.

20 THE WITNESS: I'm sorry, sir, this is the
21 same exhibit you handed me before.

22 MR. FINZEN: Yeah, that -- that is the --

23 THE WITNESS: You asked me a question about
24 3.30, and that says 2.80 on the bottom.

25 MR. FINZEN: I'm sorry. Let me hand that

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1 back to you. Let me re-ask the question. I -- I
2 misstated --

3 MR. MONICA: Can I just see? I just want
4 to make sure --

5 MR. FINZEN: Correct. I have the right
6 exhibit, I gave you the wrong number. Let me -- let
7 me re-ask the question.

8 BY MR. FINZEN:

9 Q. In looking at Plaintiffs' Exhibit 1249, which
10 you now have in front of you --

11 Do you see that?

12 A. Yes.

13 Q. -- in the top box of this exhibit there is
14 listed the totals for advertising, marketing and
15 promotion expenditures and youth prevention
16 expenditures that appear in the 1954-1994 total
17 column for those lines in the Exhibit 602A that we
18 just looked at. Do you see that?

19 A. Yes.

20 Q. And then in the lower box on this exhibit there
21 is a calculation using those figures whereby the
22 total youth prevention expenditure is divided by the
23 total advertising, marketing and promotion
24 expenditure to give a fraction. Do you see that?

25 A. Yes.

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1 Q. And then that fraction is multiplied by \$10,000
2 to give a figure that appears at the bottom right of
3 that box on Exhibit 1249. Do you see that?

4 A. Yes.

5 Q. And what this shows is that during the period
6 1954 to 1994, for every \$10,000 that Lorillard spent
7 in youth prevention -- or I'm sorry, in advertising,
8 marketing and promotion, it spent \$2.80 in youth
9 prevention expenditures. Do you see that?

10 A. Yes.

11 Q. My question of you, Mr. Tisch, is: Do you
12 believe that a cigarette company that spends \$2.80 on
13 youth prevention for every \$10,000 that it spends on
14 advertising trying to sell its products shows any
15 real commitment to keeping young people from
16 smoking?

17 MR. MONICA: I --

18 MR. WACHTELL: Object.

19 MR. MONICA: I object to this as being
20 vague and confusing, lack of foundation, assumes
21 facts -- facts not in evidence, mischaracterization
22 of what the figures are. And you're asking a
23 witness -- this witness to assume that your expert's
24 computations have any significance and have any
25 meaning, and then you're purporting to state what

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1 they mean and asking the witness to adopt this in his
2 answer. And I object --

3 MR. FINZEN: John --

4 MR. MONICA: -- on all --

5 Let me finish. I object for all those reasons.

6 MR. WACHTELL: I got an objection that if
7 you're trying to count the piousness of the witness's
8 testimony before the committee, these numbers go back
9 40 years, so they're quite irrelevant to the position
10 of the company before the committee.

11 MR. FINZEN: Do you have the question in
12 mind?

13 THE WITNESS: No.

14 MR. FINZEN: Would you read it back,
15 please?

16 No, let me -- let me read the question back.
17 I'll read it.

18 Q. My question to you, Mr. Tisch, is: Do you
19 believe that a cigarette company that spends \$2.80 on
20 youth prevention for every \$10,000 that it spends --
21 \$10,000 that it spends on advertising trying to sell
22 its products shows any real commitment to keeping
23 young people from smoking?

24 MR. MONICA: Objection, vague and
25 confusing, lack of foundation, assumes facts not in

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1 evidence.

2 A. I think these -- these numbers are --

3 You know, I don't know how these numbers were
4 developed, what the significance of the numbers are.
5 They're taking different points in time. You know, I
6 think the -- that the numbers are almost -- almost
7 meaningless, and I -- I don't know how to
8 characterize all these numbers.

9 Q. And the reason that Lorillard doesn't do more by
10 way of trying to keep under-age smokers from
11 beginning smoking is because the company recognizes
12 that the future of its business is in under-age
13 smokers beginning smoking; correct?

14 MR. MONICA: Object to that as being,
15 again, vague and confusing, misstating facts, assumes
16 facts not in evidence, and a lack of foundation.

17 MR. WACHTELL: Add -- add argumentative.

18 A. There's not a question in there.

19 MR. MONICA: It sounds like an assertion of
20 alleged fact.

21 Q. Can you answer the question?

22 A. There's not a question.

23 MR. MONICA: Would you re --

24 Would you state a question, please?

25 MR. FINZEN: Yeah, I -- I will.

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1 Q. And the reason that Lorillard doesn't do more by
2 way of trying to keep under-age smokers from
3 beginning smoking is because the company recognizes
4 that the future of its business is in the under-age
5 smokers beginning smoking; correct?

6 MR. MONICA: Also -- same objections. In
7 addition, it's a compound question.

8 A. Incorrect.

9 THE REPORTER: We have to change tape. Off
10 the record, please.

11 (Discussion off the record.)

12 BY MR. FINZEN:

13 Q. Mr. Tisch, are cigarettes safe?

14 MR. MONICA: Objection, vague and
15 confusing.

16 A. I don't think I ever said they were safe.

17 Q. And that's your answer, --

18 A. That's my answer.

19 Q. -- you've never said they were safe?

20 A. That's my answer.

21 MR. FINZEN: That's all I have.

22 THE REPORTER: Off the record, please.

23 (Discussion off the record.)

24 DIRECT EXAMINATION

25 BY MR. MONICA:

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1 Q. Mr. Tisch, we've -- you know, we've met before.
2 My name is John Monica. I represent Lorillard
3 Tobacco Company at the deposition. I have just a
4 couple of questions that I wanted to clarify a couple
5 of issues, make sure that I understand them.

6 First of all, I'm looking at your testimony from
7 yesterday and I'm at a page -- page 117, and I'm
8 going to read to you questions and answers given and
9 then I have a question or two about this testimony.

10 MR. WACHTELL: John, would you want me to
11 put the transcript in front of the witness?

12 MR. MONICA: Would you please do that?

13 MR. WACHTELL: Yes.

14 MR. MONICA: Yes, thank you.

15 BY MR. MONICA:

16 Q. And on page -- excuse me -- 117, starting at
17 line ten:

18 "Question: At any time before you testified at
19 the Waxman Committee, were you aware that Lorillard
20 targeted smoke pH as a specification in any brand of
21 its cigarettes?

22 "MR. WACHTELL: Object to the question as
23 lacking foundation and misleading.

24 "Answer: Will you repeat the question?

25 "Question: Yes.

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1 "At any time before you testified at the Waxman
2 hearing, were you aware that Lorillard targeted pH,
3 smoke pH as a specification -- as a specification in
4 any brand of its cigarettes?

5 "MR. WACHTELL: Same objection.

6 "Answer: I believe I was.

7 "Question: When did you first become aware of
8 that?

9 "Answer: I believe when we -- that --

10 "That was one of the criteria, if I remember
11 correctly, in some of the product development papers
12 I may have seen when I was a brand manager," end of
13 quote.

14 Now here are -- here are -- are my questions:

15 At any time while you were with Lorillard, did
16 Lorillard measure smoke pH?

17 A. Did they measure smoke pH?

18 Q. Yes.

19 A. I believe they did.

20 Q. And was that what you were referring to in your
21 answer that I just -- your -- the question and
22 answers that I just read?

23 A. Yes.

24 Q. Did Lorillard ever set a goal to try to achieve
25 any certain pH level of which you're aware?

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1 A. I don't know.

2 Q. And as I understand your answer to this series
3 of questions, you were speaking of the fact that
4 Lorillard did on occasion measure pH; is that
5 correct?

6 MR. FINZEN: Objection, leading.

7 A. I was speaking on the basis that I believed that
8 Lorillard did measure the pH.

9 Q. All right. Now I have another question for you,
10 and I'll get counsel to scroll up on this one because
11 it's not been typed yet. It's at 32:02.

12 MR. MONICA: If you'll let me know, Bruce,
13 when you get there, then I'll --

14 THE REPORTER: Let's go off the record a
15 moment, please.

16 (Discussion off the record.)

17 BY MR. MONICA:

18 Q. Mr. Tisch, another area I wanted to clear up
19 about your testimony today about knowledge of whether
20 or not any chemicals or compounds in smokes -- smoke
21 had been recognized by anyone as being carcinogenic,
22 in this regard I direct your attention to the screen
23 in front of you. I'm going to read the question and
24 answer, and then I'm going to ask you some questions
25 about it. And it's -- the reference point is 31:30.

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1 That's the starting point.

2 "Question: Were the you" -- I assume it will
3 just be "you" -- "aware from any source before your
4 testimony at the subcommittee in April of 1994 that
5 any of the chemicals in cigarette smoke were
6 recognized as carcinogenic?

7 "MR. WACHTELL: Object to the form of the
8 question as vague and ambiguous.

9 "Answer: I -- I don't --

10 "No, I don't know.

11 "Question: You just don't recall or -- or --

12 "Answer: I don't -- I don't believe I did, but
13 I can't be a thousand percent sure."

14 Those were the questions and the answers. Now
15 here is my question to you. I'm a little bit
16 confused by counsel's use of the term "recognized"
17 when he asked you whether any chemicals in cigarette
18 smoke were recognized as carcinogenic, and I'd like
19 to try to make sure that your answer on -- on this
20 issue is -- is clear.

21 At the time you gave your testimony before the
22 Waxman subcommittee in April of 1994, were you aware,
23 Mr. Tisch, that some individuals did have the opinion
24 that certain compounds or chemicals in cigarette
25 smoke could be injurious or carcinogenic?

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1 MR. FINZEN: Objection, leading.

2 A. I believe I was aware of that, yes.

3 Q. You were generally aware of that?

4 A. I was aware of that.

5 MR. MONICA: All right. I have no further
6 questions. Thank you.

7 THE REPORTER: Off the record, please.

8 (Discussion off the record.)

9 (Minnesota deposition concluded at 11:36
10 o'clock a.m.)

11 ADVERSE EXAMINATION

12 BY MR. GOTTLIEB:

13 Q. Good morning, Mr. Tisch.

14 A. Good morning.

15 Q. My name is --

16 MR. MANSFIELD: Just before we begin, I
17 just want to make sure for purposes of the New York
18 transcript that we're continuing the stipulations
19 that we've been using in the Small case, objections
20 that have been made, and to the extent that the
21 transcript is at all relevant to the Small case, and
22 I'm not making any statement one way or the other as
23 to whether it is, but all objections that have been
24 made by one counsel are deemed to be objections of
25 all counsel.

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1 MR. GOTTLIEB: I agree to that.

2 BY MR. GOTTLIEB:

3 Q. And you understand, Mr. Tisch, that you're still
4 under oath?

5 A. I understand that.

6 Q. And the same stipulations apply. If you don't
7 understand any of my questions, please let me know
8 and I'll try to rephrase it to make it more clear.

9 I'll be asking you a number of questions, mostly
10 follow-ups and just a few new areas. You had stated
11 yesterday --

12 MR. WACHTELL: One second. How do I get --

13 MR. MONICA: "O."

14 MR. WACHTELL: "O." Okay. Sorry.

15 Q. You stated yesterday, Mr. Tisch, that you still
16 have some contact with management at Lorillard; is
17 that correct? I believe it was on an informal
18 basis.

19 A. That is correct.

20 Q. Could you clarify what type of informal contact
21 you have with Lorillard management?

22 A. Lorillard is a subsidiary of Loews Corporation,
23 and there are questions that come up and there's --
24 you know, for a question of historical perspective,
25 management has felt free to call me at times just

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1 for -- for my perspective on certain things that were
2 done during my tenure.

3 There's also a formal communication in the form
4 of once a year a budget is presented, projections are
5 presented to Loews Corporation and I sit in on those
6 meetings.

7 Q. How frequently do you have contact with
8 Lorillard management, let's say for last year?

9 A. Formal or informal?

10 Q. Informal.

11 A. Informal, once every -- once or twice every
12 couple of weeks.

13 Q. More or less an ongoing basis?

14 A. No, once or twice every couple of weeks.

15 Q. But you don't skip a few months between meetings
16 or communications; do you?

17 MR. WACHTELL: Object to the form of the
18 question. He hasn't testified to meetings other than
19 the budget meeting.

20 A. I may have contact periodically, and there may
21 be several weeks when -- when I have no contact at
22 all.

23 Q. What --

24 A. Now, you know, I -- I should also say that in
25 connection with my responsibility under the

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1 management agreement between Loews Corporation and
2 Lorillard, there were certain areas that -- with
3 which I was very much involved on a -- on an ongoing
4 basis between Loews and Lorillard.

5 Q. Would you clarify what your responsibilities are
6 in that respect?

7 A. Well prime -- primarily in some of the human
8 services areas, particularly as it related to the
9 Lorillard move between -- from New York to
10 Greensboro, North Carolina, there was a certain
11 amount of -- of ongoing involvement there that has
12 now come to an end.

13 Q. Would it be fair to say that if you had an idea
14 regarding what Lorillard should do in the future,
15 that Lorillard management would take that under
16 consideration?

17 MR. MANSFIELD: Object to the form of the
18 question.

19 MR. WACHTELL: Objection.

20 A. I don't understand the question.

21 Q. Well let's say you had an idea on how Lorillard
22 could save money in production. Would -- you know,
23 would you be able to contact people at Lorillard
24 and -- and have those people consider your proposals?

25 A. I'd be able to contact the people at Lorillard.

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1 Whether they considered it or not --

2 I mean they -- they probably feel -- feel that
3 they would -- should give me an answer.

4 Q. Well if you had reason to believe that Lorillard
5 should advertise differently in the future, would
6 there be somebody at Lorillard who you could contact
7 and discuss that issue with?

8 MR. MANSFIELD: Object to the form of the
9 question, it's vague, it's ambiguous.

10 MR. WACHTELL: Hypothetical.

11 MR. MANSFIELD: Calls for speculation.

12 MR. WACHTELL: Hypothetical.

13 MR. GOTTLIEB: You can answer the question.

14 A. There -- there --

15 I would probably call the chief operating
16 officer.

17 Q. And you'd be able to discuss that matter with
18 the chief operating officer?

19 MR. MANSFIELD: Same objections.

20 A. I would say it's reasonable to say that we could
21 discuss it.

22 I also have a social relationship with him. We
23 do have lunch and dinner periodically --

24 Q. Uh-huh.

25 A. -- if he's in New York or if I'm in Greensboro.

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1 Q. So it would not be unusual for you to meet with
2 him and -- and to talk, at least in part, about
3 business relating to Lorillard.

4 A. Sure.

5 Q. Does Lorillard sell any of its cigarettes in
6 countries other than the United States?

7 MR. WACHTELL: What timeframe are you
8 talking about?

9 MR. GOTTLIEB: Right now, currently.

10 A. Minimal that I know of.

11 Q. Can you clarify that?

12 A. Probably none, but certainly less than one
13 percent of its volume is overseas.

14 Q. Do you know of any country in which Lorillard
15 presently sells cigarettes -- its cigarettes, other
16 than the United States, of course?

17 A. No, I don't.

18 Q. Do you know if that situation was different any
19 time in the last, I don't know, 20 years? In other
20 words, was there a time that Lorillard sold its
21 products overseas in greater volume?

22 MR. MANSFIELD: Which question are you
23 asking?

24 MR. GOTTLIEB: My current question.

25 A. Was there a time that Lorillard --

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1 MR. MANSFIELD: Object -- object to the
2 form of the question, it's vague and ambiguous.

3 A. Lorillard previously had sold products overseas.

4 Q. Do you know what time period that was?

5 A. Lorillard had a fairly significant international
6 business that I believe was sold in 1978. Under my
7 tenure we tried to re-establish some overseas
8 business but were unsuccessful.

9 Q. In 1978 who did Lorillard sell its overseas
10 business to?

11 A. I believe they sold it to either
12 British-American Tobacco or a subsidiary, I'm not
13 sure whom. One or the other.

14 Q. When it sold its overseas business, was it
15 selling only the right to use certain brand names, or
16 was it selling, in addition, the formulas for
17 manufacturing those brands?

18 MR. MANSFIELD: Objection to the form of
19 the question, it's vague and ambiguous and compound.

20 A. I believe it sold its -- the names, the
21 inventory, and the formulas as well as a certain
22 amount of equipment.

23 But I was not CEO at the time, and I -- I was
24 not involved with -- with Lorillard at that point in
25 time.

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1 Q. Do you know whether today you can purchase
2 Lorillard brands in, let's say, Canada? When I'm
3 saying "Lorillard brands," I'm talking about the same
4 brands that are sold in the United States.

5 MR. WACHTELL: Well there's an inherent
6 ambiguity in the question. They may have the same --
7 I mean, you may have the same name, but does
8 that mean it's the same cigarette? Or --

9 MR. GOTTLIEB: Well let me see if I can
10 clarify that.

11 Q. With the understanding that it would be sold in
12 Canada by a subsidiary of B.A.T., do you have an
13 understanding that such cigarettes, with the same
14 brand, are sold in that -- in Canada as in the United
15 States?

16 MR. WACHTELL: You haven't cured the
17 ambiguity, Leo.

18 A. It's still very --

19 MR. WACHTELL: Is it the same cigarette or
20 is it just someone else's cigarette with the same
21 brand name in a foreign country. Which -- which is
22 your question?

23 Q. My question is: Do you know whether somebody
24 else with the -- is selling cigarettes in, let's say,
25 Canada, that have the same brand name as Lorillard

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1 cigarettes which are sold in the United States?

2 A. I --

3 If I understand the question correctly, I

4 believe that they are.

5 Q. And that would be a subsidiary of B.A.T.?

6 A. I -- I believe it would be. I don't know how

7 they've structured their business.

8 Q. And to your knowledge, would those cigarettes be

9 basically the same cigarettes in terms of its

10 manufacturing process as -- as the ones that are sold

11 in the United States?

12 MR. WACHTELL: You're not suggesting it's

13 manufactured by Lorillard.

14 MR. GOTTLIEB: No, I'm not.

15 MR. WACHTELL: That's the ambiguity --

16 that's the ambiguity in your question.

17 MR. GOTTLIEB: I'm just trying to find out

18 if it's manufactured by the same process.

19 MR. WACHTELL: If you know.

20 A. I'm not -- you know, I'm not that well-versed in

21 manufacturing, so I couldn't answer that question.

22 Q. You mentioned that while you were CEO, there

23 were some attempts by Lorillard to re-establish

24 business overseas. Could you amplify on those

25 attempts?

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1 A. We took several -- several of the names that had
2 not been sold to B.A.T. or that came later on, that
3 were established after the sale of the brand names to
4 B.A.T. in 1978, I believe it was, and we tried to
5 create a business in certain overseas countries.

6 Q. Do you recall which countries?

7 A. I believe we were trying to work in Japan, in
8 the Czech Republic, and in some of the African
9 countries.

10 Q. Anywhere else?

11 A. Not that I can recall.

12 Q. And do you recall what time period that was?

13 A. That would be during my tenure, so that would be
14 probably '81 to -- I'm sorry, '91 to '94, '95.

15 Q. Now you said this wasn't a successful endeavor?

16 A. No, it wasn't.

17 Q. Was the over --

18 Were the overseas operations sold, or were they
19 just discontinued?

20 A. They were --

21 MR. MANSFIELD: Object to the form of the
22 question.

23 A. They were -- they were discontinued.

24 Q. You were answering a number of questions today
25 regarding CNA and its insurance policies. Do you

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1 recall those questions and your answers?

2 A. Yes.

3 Q. As I understood it, most of the questions today,
4 if not all, referred to life insurance policies that
5 were issued by CNA. Is that --

6 Was that your understanding as well?

7 A. I believe so, yes.

8 Q. Do you know whether CNA ever issued health
9 insurance --

10 Well does it issue health insurance, period?

11 MR. MANSFIELD: Are you asking now?

12 MR. GOTTLIEB: Yes.

13 A. I believe it does.

14 Q. And has it issued health insurance over the last
15 20 or 30 years?

16 A. I believe so.

17 Q. Do you know whether it ever charged different
18 premiums to smokers and non-smokers for its health
19 insurance?

20 A. I'm --

21 I don't know offhand.

22 Q. During the course of the last two days there's
23 been much discussion regarding your position on
24 whether or not cigarette smoking causes lung cancer
25 and other diseases. Would it be fair to say that you

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1 believe that it may cause lung cancer and other
2 diseases, but you're not certain?

3 MR. MANSFIELD: I object to the form of the
4 question, and I object to the preamble to the
5 question.

6 THE WITNESS: Will you repeat the question,
7 please?

8 MR. GOTTLIEB: Will you read it back,
9 please?

10 (Record read by the court reporter.)

11 A. I think that's a fair characterization.

12 Q. There has also been much discussion as to how
13 certain or uncertain you are, so I'm going to try to
14 see if we can clarify that.

15 MR. WACHTELL: I don't believe there has
16 been.

17 MR. GOTTLIEB: In any event, I'll try to
18 clarify the witness's position.

19 MR. WACHTELL: So I've just precluded
20 myself from saying "asked and answered?" Okay. Go
21 ahead.

22 MR. GOTTLIEB: Actually, I think much of
23 the discussion was by counsel.

24 BY MR. GOTTLIEB:

25 Q. I'm going to give you several choices. You

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1 don't have to choose one, but you can if you wish.

2 Would you say that there is a small amount of
3 evidence supporting the position that cigarette
4 smoking causes cancer, or would you call it a -- a
5 50/50 question, or do you think the majority of
6 the -- do you think that the preponderance of the
7 evidence indicates that cigarette smoking causes
8 cancer, do you think it's almost certain? I'd like
9 you to --

10 A. I -- I don't --

11 Q. -- clarify your position. But first -- first
12 let me --

13 MR. WACHTELL: I object. I object to the
14 form of the question. I think that the witness's
15 previous testimony has focussed on the differential
16 of types of evidence, statistical as opposed to
17 scientific cause, and I don't think it relates --
18 what you have done relates to the witness's previous
19 testimony.

20 MR. GOTTLIEB: Well --

21 MR. MANSFIELD: Let me add to that. I
22 object to the form of the question as well, it is
23 vague, it's ambiguous, indeed it's unintelligible,
24 but more important it has absolutely no bearing to
25 any of the issues in the class action pursuant to

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1 which we are here today. I understood it to be
2 plaintiffs' position, as stated in open court on more
3 than one occasion, that this is not a
4 smoking-and-health case; accordingly, whatever
5 evidence was taken earlier today in the deposition is
6 really irrelevant for purposes of the Small case, and
7 I would object to any line of questions delving into
8 smoking-and-health issues.

9 MR. REILLY: And I would add to that that
10 your co-counsel, when they deposed Dr. Spears in
11 August, made that representation, and accordingly did
12 not ask any such questions.

13 MR. GOTTLIEB: Will you direct the witness
14 not to answer?

15 MR. MANSFIELD: At this point, if we're
16 just clarifying a question or two, with the
17 objections stated, I won't. But if we're going to be
18 spending the hour or two that you claim that you had
19 left of questions on smoking-and-health issues, then
20 I may very well.

21 MR. GOTTLIEB: Why don't I rephrase the
22 question, and we'll continue.

23 BY MR. GOTTLIEB:

24 Q. Can you specify in some manner how certain or
25 uncertain you are regarding whether or not cigarette

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1 smoking causes lung cancer?

2 MR. MANSFIELD: I restate the objections.

3 Also, what is the timeframe? Are you asking him as

4 he sits here today?

5 MR. GOTTLIEB: Yes, as he sits here today.

6 A. I really can't put a percentage to it.

7 Q. Can you -- I --

8 I don't expect a specific number like 42.3

9 percent certain, but can you clarify it in any

10 respect?

11 A. I can't give you --

12 No, I can't give you a -- a ballpark. I

13 don't -- you know, I don't know.

14 Q. Yesterday you produced a document which has been

15 marked as Plaintiffs' Exhibit 1267. Could you just

16 take a look at that?

17 A. Can I have a copy of it, please?

18 MR. MONICA: What's the number again?

19 MR. WACHTELL: This is the xerox of the

20 index cards?

21 MR. GOTTLIEB: Yes, it is.

22 THE REPORTER: I have it here.

23 (Exhibit 1267 handed to the witness.)

24 MR. MANSFIELD: Louis, for purposes of the

25 New York deposition, do you want to keep the same

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1 number?

2 MR. GOTTLIEB: Yes. Just for
3 identification purposes, that will be fine.

4 BY MR. GOTTLIEB:

5 Q. On the bottom of the first page, Mr. Tisch,
6 could you read what is written there under the words
7 "YOUTH SMOKING?"

8 A. This is written from -- this --

9 This is read from my three-by-five cards, "YOUTH
10 SMOKING, ADULT DECISION, NO ONE UNDER 18 SHOULD
11 SMOKE, HYSN PROGRAM TO YOUTH, ITL PROGRAM TO
12 RETAILERS."

13 Q. Can you tell me what HYSN stands for?

14 A. Helping Youth Say No, which is a program of
15 advertising to parents of high-school --
16 high-school-age teens who may or may not be
17 considering starting to smoke.

18 Q. Is that a program that Lorillard has supported?

19 A. It's a program that was developed by The Tobacco
20 Institute that Lorillard helped to pay for.

21 Q. Through its contributions to The Tobacco
22 Institute?

23 A. That's correct.

24 Q. Do you know how long that program has been in
25 effect?

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1 A. I'm not sure if it's still in effect. It had
2 been in effect for several years while I was at
3 Lorillard.

4 Q. And then it says the "ITL PROGRAM TO RETAILERS."

5 A. Right.

6 Q. What does ITL stand for?

7 A. ITL, if I remember correctly, stands for It's
8 the Law, and it was decals and other store
9 paraphernalia, change trays and things like that that
10 the retailer would -- would put in his store stating
11 that it was the law that tobacco cigarette -- tobacco
12 products could not be sold to anyone under 18 years
13 of age.

14 Q. You have stated on a number of occasions that
15 both you personally, I believe, and -- and Lorillard
16 has taken a position that persons under the age of 18
17 should not smoke; is that correct?

18 A. That is correct.

19 Q. Can you tell me what Lorillard has done to
20 reduce teenage smoking in this country?

21 MR. MANSFIELD: I object. Again, you are
22 far afield of the Small complaint. That issue is not
23 raised in the complaint, it is not an issue that is
24 on class-certification motions before the judge right
25 now, and it's not an issue that's in the motions to

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1 dismiss.

2 Is it plaintiffs' intention now to inject that
3 issue into the case?

4 MR. GOTTLIEB: Plaintiffs' intention right
5 now is to ask the question.

6 MR. MANSFIELD: If it's not relevant to any
7 issue in the case, then I object to asking the
8 question. It's not calculated to lead to discovery
9 or discoverable material.

10 MR. GOTTLIEB: I'll give the same reply as
11 before: I intend to ask a question. I will not
12 withdraw it. If you wish to instruct the witness not
13 to answer, go ahead.

14 MR. MANSFIELD: You can answer the
15 question.

16 THE WITNESS: Could you repeat the
17 question, please?

18 MR. GOTTLIEB: Could you read it back,
19 please?

20 (Record read by the court reporter.)

21 MR. WACHTELL: Well I -- I have -- I
22 have -- I have another problem. You're questioning
23 this witness as if -- as if he's a spokesperson here
24 for Lorillard. He is not with Lorillard now, and I
25 don't think he's a Lorillard spokesperson to tell you

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1 what Lorillard has done. I suppose part of what
2 Lorillard has done would involve the entire global
3 settlement initiative. But he isn't the right
4 person.

5 If you want to ask him what they did while he
6 was there where he's a percipient fact witness,
7 that's fine.

8 MR. GOTTLIEB: Well why don't I ask it as
9 to what Lorillard -- Lorillard has done with respect
10 to the time you were with Lorillard.

11 MR. WACHTELL: That's fine, I have no
12 problem with that, other -- other than -- I mean I'm
13 not going to speak to counsel's objection as to
14 relevance in the New York action.

15 MR. GOTTLIEB: I understand.

16 A. Whatever list I give you, someone's going to
17 say, "Well that's not enough." You know, so I mean
18 it's -- it's kind of a -- kind of a silly question.
19 Lorillard's policy and the way we try to conduct our
20 business was to discourage youth smoking as much as
21 possible. We sub -- we ascribe to an advertising
22 code and a sampling code, we -- that was specifically
23 designed to not appeal to youth either in our
24 advertising or our promotion. Our sampling policies
25 and procedures specifically excluded anyone who was

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1 under age. Lorillard even went further than some of
2 the guidelines that were -- were in these codes and
3 policies and procedures. You know, we -- we tried to
4 discourage our -- our retailers from selling to
5 youth. We supported the Helping Youth Say No and
6 It's the Law programs. And I could list -- probably
7 go on for another half hour and you would still say,
8 "Well, that was not enough."

9 Q. You just mentioned "discouraging retailers."
10 Could you tell me what Lorillard has done to
11 discourage retailers from selling to people under the
12 age of 18?

13 MR. WACHTELL: During his tenure.

14 MR. GOTTLIEB: Well I'll limit it at this
15 point to during his tenure, but if he is aware of
16 actions that Lorillard has taken since his tenure, --

17 MR. WACHTELL: No.

18 MR. GOTTLIEB: -- I may ask that in the
19 future. For now I'm limiting it to --

20 MR. WACHTELL: Fine.

21 MR. GOTTLIEB: -- during your tenure.

22 A. Okay. During my tenure, you know, our -- our
23 policies and plans to the field were to make sure
24 that the retailer understood that tobacco products
25 were not to be sold to anyone under age.

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1 Q. Do you know what penalty retailers face if they
2 sell to people under the age of 18?

3 MR. WACHTELL: Is this a 50-state survey?

4 Q. Do you know in any state what the penalties
5 might be for retailers?

6 A. I don't know what the specific penalties are.

7 Q. Do you think it would be a good idea in general
8 to increase those penalties?

9 MR. MANSFIELD: I object to the form of the
10 question.

11 MR. WACHTELL: You're beyond the purview of
12 what this witness is here to testify to. If you want
13 to ask him as to facts that he knows, you know,
14 that's fine, but if you're asking him for an opinion,
15 you're going to have to pay him a fee.

16 MR. GOTTLIEB: Are you directing the
17 witness not to answer the question?

18 MR. WACHTELL: Yeah.

19 MR. FINZEN: Are you taking the direction
20 of counsel?

21 THE WITNESS: Yes.

22 MR. WACHTELL: Leo, I'm -- I'm not going to
23 block your deposition in any way if you ask questions
24 that are designed to elicit any information this
25 witness has, but if you want to start to argue with

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1 him or asking him his opinion as to this or not, he
2 is no longer a Lorillard person, I think you're
3 beyond the pale. So I'm just trying to move this
4 along.

5 MR. GOTTLIEB: Well my position is that he
6 still has a significant influence on Lorillard, he
7 still has contact with Lorillard, he still can obtain
8 information from Lorillard, and therefore I believe
9 my question is valid.

10 MR. WACHTELL: Yeah, but you're still
11 asking him opinion testimony, you're not asking him
12 facts. Ask him facts.

13 MR. GOTTLIEB: You directed him not to
14 answer and I'll move on.

15 MR. WACHTELL: Okay. Fine.

16 BY MR. GOTTLIEB:

17 Q. You stated earlier that your only personal
18 smoking experience was very briefly in college, and
19 sporadically at that; is that correct?

20 MR. WACHTELL: I don't think he said that.

21 MR. MANSFIELD: Object to the form of the
22 question, and it also misstates his testimony.

23 MR. WACHTELL: Yeah. He didn't say that.

24 Q. Well can you tell me what your smoking history
25 is?

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1 MR. MANSFIELD: I -- I object. How could
2 this possibly be relevant to any issue in the Small
3 case?

4 MR. GOTTLIEB: You can answer.

5 MR. WACHTELL: My -- my objection is really
6 asked and answered. I mean this was specifically
7 asked and specifically answered. It was not the
8 answer you just indicated, I don't believe. If you
9 look --

10 MR. GOTTLIEB: Well I'd like him to
11 clarify. Maybe I'm mistaken.

12 MR. WACHTELL: I'll give you latitude on
13 this.

14 A. A little bit during my college and a little bit
15 during my first few years at Lorillard.

16 Q. Did anyone ever advise you to quit smoking?

17 A. Not that I can recall.

18 Q. Did anyone ever advise you not to start smoking?

19 A. My parents may have.

20 Q. Did they tell you why?

21 A. No.

22 Q. Did you ever advise anyone to quit smoking?

23 A. Yes.

24 Q. Who did you advise to quit smoking?

25 A. I advised -- I advised my brother.

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- 1 Q. Which brother?
- 2 A. My brother Dan.
- 3 Q. When was that?
- 4 A. Probably 10, 12 years ago.
- 5 Q. Why did you ask him or advise him to quit
- 6 smoking?
- 7 A. Because he was smoking a lot.
- 8 Q. Could you define "a lot" for me?
- 9 A. Three, four packs a day.
- 10 Q. Did you think it was bad for his health?
- 11 A. I didn't know.
- 12 Q. Can you tell me why you advised him to quit
- 13 smoking then?
- 14 MR. MANSFIELD: Asked and answered.
- 15 A. Because, you know, I felt that he was smoking
- 16 too much.
- 17 Q. Did you advise him to cut back or to quit?
- 18 A. To quit.
- 19 Q. Did he follow your advice?
- 20 A. I'm not sure if he followed my specific advice,
- 21 but he quit.
- 22 Q. Do you know if he had any difficulty in
- 23 quitting?
- 24 A. I believe he did.
- 25 Q. Was he able to quit the first time he attempted

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1 to quit, to your knowledge?

2 A. I don't --

3 I don't know if it was the first time he

4 attempted to quit, but -- but he did quit.

5 Q. Do you know if he had any difficulty in

6 quitting?

7 MR. MANSFIELD: Asked and answered.

8 A. I -- I -- I don't know. I would presume he had

9 some difficulty. Really -- I think he really enjoyed

10 smoking.

11 Q. Did he ever discuss with you any difficulties he

12 may have had in quitting smoking?

13 A. No.

14 Q. Was there anybody else you ever advised to quit

15 smoking?

16 A. Not that I can think of offhand.

17 MR. WACHTELL: You're -- you're talking

18 about personal advice in these questions.

19 MR. GOTTLIEB: Yes.

20 Q. Is there anybody who you advised --

21 A. I -- I also -- I also advised the same brother

22 to go on a diet.

23 Q. Did you ever advise anyone to cut down on their

24 smoking?

25 A. Not that I can think of.

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1 Q. Do you know whether most quit attempts end in
2 failure? I'm talking about attempts to quit smoking.

3 A. I think that's a --

4 MR. MANSFIELD: Are you asking --
5 Are you asking an expert opinion?

6 MR. GOTTLIEB: No, I'm just asking him his
7 knowledge. He had been the CEO of Lorillard. I
8 think he may have some knowledge about this.

9 A. I don't understand how you -- how you define
10 "failure."

11 Q. Where people start smoking again.

12 A. I think some people quit and start smoking
13 again. Others quit and quit.

14 Q. Do you know whether most people who attempt to
15 quit fail in those attempts?

16 A. If you're asking me do I know if they are able
17 to quit on the first attempt, a lot of people are not
18 able to quit on the first attempt. But I know that
19 people quit. My wife quit. Quit. Just stopped.

20 Q. Do you know whether smokers experience weight
21 gains when they quit smoking?

22 A. It's been --

23 MR. WACHTELL: Objected to as vague and
24 ambiguous. All smokers? Some smokers? Personal
25 knowledge, has he heard it? The question is -- is

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1 just --

2 I think you better define your terms.

3 MR. MANSFIELD: If you're calling for an
4 expert opinion, it's not the proper witness. If
5 you're trying to see whether he's read studies and so
6 forth, it's not the proper witness. If you're
7 looking for anecdotal information he may have in his
8 capacity as a citizen of the United States, it's
9 irrelevant for any conceivable purpose in the Small
10 case.

11 MR. GOTTLIEB: Can you answer the question,
12 please?

13 THE WITNESS: What's the question?

14 MR. GOTTLIEB: Can you read it back,
15 please.

16 (Record read by the court reporter.)

17 A. I believe some do. But I'm -- I'm not sure that
18 there's a direct correlation between their quitting
19 smoking and their gaining weight.

20 Q. Is it your understanding that many people who
21 quit smoking experience weight gains immediately
22 thereafter?

23 MR. MANSFIELD: Object to the form of the
24 question.

25 MR. WACHTELL: What do you mean by "many?"

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1 A. I don't -- I don't know what you mean by that.

2 Q. Do you have an understanding as to whether there
3 are thousands of compounds in cigarette smoke?

4 MR. WACHTELL: That was asked and answered
5 yesterday.

6 A. I don't --

7 MR. WACHTELL: You can answer.

8 A. I don't know that I would use the term
9 "thousands," but I would certainly -- I certainly
10 say there are at least hundreds.

11 Q. Would you agree that some cigarette smokers
12 smoke, at least in part, in order to obtain nicotine?

13 A. I don't know.

14 Q. Have you heard statements to that effect?

15 A. Well you just -- you just made that statement.

16 Q. Other than from me.

17 A. I've heard that nicotine is -- is part of the
18 smoking experience.

19 Q. And have you heard that from Lorillard
20 employees?

21 A. I don't recall where I heard it from.

22 Q. Have you read studies to that effect?

23 A. I don't recall any.

24 Q. Have you read any literature to that effect?

25 MR. WACHTELL: Do we have a timeframe? You

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1 mean up to this moment?

2 MR. GOTTLIEB: Yes.

3 A. I --

4 You know, I'm sure I've read articles in general
5 publications.

6 Q. Did you have any discussions with anybody in
7 Lorillard during the time that you were working at
8 Lorillard on the issue of whether cigarette smokers
9 smoke, in part, in order to obtain nicotine?

10 MR. WACHTELL: You just changed the
11 question, Leo. The previous question was "some
12 cigarette smokers." Is it all cigarette smokers that
13 you're now asking him about, or some cigarette
14 smokers?

15 MR. GOTTLIEB: Let's confine it to some
16 cigarette smokers.

17 MR. MANSFIELD: Right now your question is
18 just whether he had any discussions.

19 MR. GOTTLIEB: That is correct.

20 MR. WACHTELL: I think this was asked and
21 answered, but he can answer it again.

22 A. Yeah. I don't --

23 I don't recall.

24 Q. Do you know what brand of Lorillard cigarettes
25 has the lowest nicotine as measured by FTC

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1 measurements?

2 MR. WACHTELL: At present?

3 MR. MANSFIELD: You mean today?

4 MR. GOTTLIEB: At present.

5 A. What --

6 I think I could probably do it more easily for
7 tar than for nicotine.

8 Q. Which would it be for tar?

9 A. For tar, probably Kent III.

10 Q. And would that have been true during the time
11 that you were CEO of Lorillard?

12 A. Probably.

13 Q. And do you have reason to believe that there is
14 another cigarette that has perhaps less tar -- no,
15 I'm sorry. Strike that. Do you think that Kent --

16 Do you know what the nicotine level is in Kent
17 III?

18 A. I don't offhand, but it's probably in the --
19 the --

20 Kent III, I believe, had three milligrams of
21 tar, so might have had 0.3, 0.4 milligrams of
22 nicotine.

23 Q. Do you know whether Lorillard, during the time
24 that you were CEO, has -- had the ability to
25 manufacture cigarettes with, let's say, half that

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1 amount of nicotine?

2 A. I -- I -- I don't know what our capability of
3 manufacturing denicotinated or reduced-nicotine
4 cigarettes was. I -- I wasn't -- I'm --
5 I was never really familiar with the
6 manufacturing technology.

7 Q. Well did you have an understanding that
8 Lorillard could remove most of the nicotine from
9 tobacco?

10 MR. WACHTELL: What do you mean by
11 "could?" You mean if it built a --

12 MR. GOTTLIEB: Had the technical capability
13 to do that.

14 MR. WACHTELL: Well had the technical
15 capability, or could build a plant to do it? What is
16 the question? You need a denic plant in order to
17 remove the nicotine. Are you asking was it possible
18 to build the plant, or did they already have a
19 plant? Which is the question?

20 MR. GOTTLIEB: Did it have the knowledge
21 with which to build such a plant.

22 MR. MANSFIELD: At what point in time?

23 MR. GOTTLIEB: During the time that he was
24 CEO.

25 MR. WACHTELL: If you know, you may answer.

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1 A. I -- I don't know.

2 Q. Do you know whether Lorillard was able to
3 produce denicotinized cigarettes on an experimental
4 basis?

5 A. I -- I believe it was.

6 Q. During what period of time?

7 A. During --

8 During the time that I was CEO.

9 Q. And was it also able to do that in the 1970s, to
10 your knowledge?

11 A. I don't know.

12 Q. In the early 1980s, to your knowledge?

13 A. I -- I don't know.

14 Q. To your knowledge, did Lor --

15 Does Lorillard to this day have the
16 technological knowhow to produce cigarettes with less
17 tar and nicotine than appears in the Kent III?

18 MR. MANSFIELD: I object to the form of the
19 question.

20 A. I believe it does.

21 Q. Do you have an understanding as to why Lorillard
22 is not doing that?

23 A. I believe that it probably goes to the
24 commercial viability of such a product.

25 Q. Is it your understanding that cigarettes with

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1 less than .03 milligrams of nicotine would not be
2 commercially viable?

3 A. Not necessarily. There are cigarettes that are
4 sold with less than 0.3 milligrams of nicotine that
5 are commercially viable, but we try to make products
6 that we feel consumers want, and I believe that there
7 are those products available, and it would be very
8 difficult to get consumers of those products to
9 switch to other brands. A few brands like Carlton
10 and a few others that have -- have less nicotine,
11 less tar, and they have their markets, and if we
12 could figure out how to get those consumers, we
13 would.

14 Q. Has Lorillard ever attempted to commercially
15 produce a denicotinized cigarette, to your knowledge?

16 A. To my knowledge, no.

17 Q. Has it taken that into consideration, let's say
18 at the planning stage?

19 A. I don't know.

20 Q. Is it something that was -- that you ever
21 discussed while you were a CEO?

22 A. I may have asked our research people if -- in --
23 in connection with some of the other denicotin --
24 denicotinized cigarettes and their successes or
25 failures, that's a possibility.

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1 Q. When you're talking about the other
2 denicotinized cigarettes, are you talking about
3 Eclipse?

4 A. The one that comes to mind is -- is Next.

5 Q. By RJR?

6 A. No, I believe Philip Morris marketed that.

7 Q. Are you also familiar with the Premier
8 cigarette?

9 A. I -- I am.

10 Q. Do you know who manufactured that?

11 A. I believe RJR manufactured that.

12 Q. Do you know what time period these --

13 Do you agree that the Premier and the Next were
14 basically denicotinized cigarettes?

15 MR. WACHTELL: Can I hear the question
16 back? Well let me read it.

17 A. I -- I'll also tell you that I know much more
18 about Premier cigarettes from having read Barbarians
19 at the Gate than anything else, than any other
20 source.

21 MR. WACHTELL: And the question is clearly
22 compound. Premier and Next are two very, very
23 different animals. So I think you have a compound
24 question there.

25 Q. Why don't I cure that.

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1 Do you know whether Premier is a denicotinized
2 cigarette?

3 A. I believe it is.

4 Q. Do you know whether Next was a denicotinized
5 cigarette?

6 A. I believe it was.

7 Q. Do you know what time period those cigarettes
8 were placed in the market?

9 MR. WACHTELL: I -- I -- I'm sorry. I -- I
10 think your question for me was misleading, I must
11 say, but if that's the witness's understanding,
12 that's his understanding.

13 Q. Do you know what time period Premier was placed
14 on the market?

15 A. I believe it was on the market in the late '80s.

16 Q. And do you know when Next was placed in the
17 market?

18 A. Maybe a little bit earlier, but in the same --
19 around the same time -- timeframe. I'm not -- I'm
20 not sure if Next was ever nationally introduced.

21 Q. Do you know whether Lorillard during that same
22 time period ever considered marketing on a commercial
23 basis denicotinized cigarettes?

24 MR. MANSFIELD: Asked and answered.

25 MR. WACHTELL: I think -- I think it's been

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1 asked and answered, and B, I think there is a
2 misleading premise in your question which is
3 disturbing me with respect to Premier, and I object
4 to the question as lacking foundation and being
5 misleading.

6 MR. GOTTLIEB: Do you recall the question?

7 MR. WACHTELL: The question is did you ever
8 consider marketing a denicotinized cigarette.

9 A. I think I answered that, didn't I?

10 Q. Could you answer it again, please?

11 A. Well what was my previous answer?

12 MR. WACHTELL: You -- you can answer
13 whether, during your tenure, Lorillard considered, to
14 your knowledge and recollection, marketing a
15 denicotinized cigarette.

16 THE WITNESS: I don't believe so.

17 Q. During --

18 MR. WACHTELL: And I'm going to object --
19 I'm going to object to the question as vague and
20 ambiguous as to what "considered" means. I mean
21 seriously considered? Gave it fleeting thought?
22 Conducted a study? I mean the question is just
23 hopelessly vague and ambiguous. I don't know what --
24 how the witness understood your question and answered
25 it.

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1 MR. GOTTLIEB: I guess he had an ability to
2 understand my question that you don't.

3 MR. WACHTELL: No, he may have thought he
4 had an ability to understand your question, but, you
5 know, the record is the record. But if you want to
6 clarify, Leo, you can clarify. Do I consider
7 something if I give it a moment's thought? Do I
8 consider something if I put a group together in a
9 room and have them write a position paper? I don't
10 know what the word "consider" means.

11 Q. While you were at Lorillard, did you engage in
12 any discussions with Lorillard employees regarding
13 the success or failure of the Premier brand of
14 cigarettes?

15 A. I'm sure I did.

16 Q. Did you have any discussion regarding the
17 success or failure of the Next brand of cigarettes?

18 A. I probably did.

19 Q. Did --

20 Would you agree that those two brands failed on
21 the commercial market?

22 A. That's my understanding.

23 Q. Did those failures influence Lorillard's
24 decision not to market a denicotinized cigarette?

25 MR. WACHTELL: Again, your question has a

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1 premise that Premier was a denicotinized cigarette.

2 I think your question lacks foundation and is

3 misleading.

4 THE WITNESS: Will you repeat the
5 question?

6 MR. GOTTLIEB: Will you read it back,
7 please?

8 (Record read by the court reporter.)

9 MR. WACHTELL: Leo, are you representing to
10 this witness that Premier was a denicotinized
11 cigarette?

12 MR. GOTTLIEB: No, I'm not.

13 MR. WACHTELL: Well then why are you --

14 I mean you're building in the premise in your
15 question that it is, and I think it's misleading.

16 A. Yeah, come to -- come to think about it, I'm not
17 sure that -- that Premier --

18 You know, I may have misstated before. I don't
19 believe that Premier, now that I think about it, I'm
20 not sure whether it was denicotinized or not.

21 MR. WACHTELL: Premier, as I think we can
22 agree, was a wholly different kind -- different kind
23 of mechanism than a -- than a traditional cigarette.
24 But unless you're representing that it was
25 denicotinized, I don't know why you're putting that

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1 premise into your questions.

2 MR. REILLY: Just to save time, I think it
3 was a form of a smokeless cigarette.

4 MR. WACHTELL: That's right.

5 MR. REILLY: But I -- I want to save time
6 here.

7 MR. GOTTLIEB: I'm just going with what --

8 MR. REILLY: We want to get out of here.

9 MR. GOTTLIEB: I'm just going with what the
10 witness said. I didn't make any representation
11 whatsoever about Premier.

12 A. Well as -- as I -- as I think about it and go
13 back to some of my understanding of it, I -- I think
14 that I -- that Premier was not a nicotine -- a
15 denic -- denicotinized cigarette.

16 Q. Okay. Having clarified that, did the success or
17 failure in the marketplace of the Premier cigarette
18 and the Next cigarette influence Lorillard's decision
19 not to attempt to market a cigarette with less
20 nicotine than is found in the Kent III cigarettes?

21 MR. MANSFIELD: Object to the form of the
22 question.

23 A. I -- I -- I don't know that I could draw that
24 conclusion.

25 Q. Do you have an understanding as to whether ultra

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1 low tar/nicotine cigarettes have a large market share
2 by comparison to cigarettes that contain more tar and
3 nicotine?

4 MR. WACHTELL: Object to the form of the
5 question as vague and ambiguous. I don't know what
6 "more" means.

7 MR. MANSFIELD: Also what time period are
8 you talking about?

9 MR. GOTTLIEB: During the time period that
10 you were CEO of Lorillard.

11 MR. MANSFIELD: Well that's not what your
12 question says. Your question says "do you have an
13 understanding."

14 MR. GOTTLIEB: Okay. I'm now limiting it.

15 MR. WACHTELL: The question is -- the
16 question is ultra low tar/nicotine as compared to,
17 quote, more, without saying what you mean by "more,"
18 is an incomprehensible question. Are you talking
19 about all -- everything above it, or are you talking
20 about some particular segment above it?

21 MR. GOTTLIEB: Do you understand the
22 question?

23 THE WITNESS: No.

24 MR. GOTTLIEB: Then why don't we back up a
25 couple of steps.

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1 BY MR. GOTTLIEB:

2 Q. Are cigarettes placed into certain categories in
3 relation to the amount of tar/nicotine that they
4 have?

5 MR. MANSFIELD: Placed by whom?

6 A. That's -- that's --

7 MR. MANSFIELD: Under what circumstances?

8 Q. For example, is an ultra low one of those
9 categories?

10 A. There -- there are different ways to classify
11 cigarettes, one of them is in groupings by tar and
12 nicotine levels.

13 Q. Can you tell me what those groupings are?

14 A. Typically there's high taste, high filtration,
15 and ultra low tar, and then they would also be
16 subgrouped by menthol or non-menthol. That would be
17 one way to look at --

18 Q. Okay.

19 A. -- look at cigarettes.

20 Q. Do you have any knowledge regarding whether the
21 ultra low cigarettes have greater or less market
22 share as compared to the other two categories that
23 you just mentioned, the high filtration and --

24 What was the third one?

25 A. High taste.

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1 Q. -- and the high taste?

2 MR. WACHTELL: Other two combined or each
3 the other two?

4 MR. GOTTLIEB: Each of the others.

5 MR. MANSFIELD: And what period of time?

6 MR. GOTTLIEB: During the time that you
7 were CEO.

8 A. I believe that the high taste cigarettes were --
9 had a larger market share than the ultra low tar
10 cigarettes. I don't remember whether the high
11 filtration cigarettes had a lower or higher share
12 than ultra low tar.

13 Q. Do you know of any ultra low tar and nicotine
14 cigarettes which are among the top 10 sellers in the
15 U.S. market --

16 MR. WACHTELL: When?

17 Q. -- during the time that you were CEO of
18 Lorillard?

19 A. You'd have --

20 You'd have to look at it by whether it's by
21 brand group, by packing. I mean if you say Marlboro,
22 you know, Marlboro has a number of different --
23 different packings in there that go the range from
24 ultra low tar to Marlboro Red. So, you know, I -- I
25 don't know how you're defining the top 10 cigarettes.

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1 Q. By particular style.

2 MR. WACHTELL: I don't understand that.

3 Objected to as vague and ambiguous.

4 A. Could you -- could you explain?

5 Q. Certainly.

6 You mentioned, for example, Marlboro having
7 different styles.

8 A. Packings.

9 Q. Packings.

10 Well, do you know of any particular packing --

11 A. I -- I don't --

12 Q. -- that would be an ultra low packing and would
13 be among the top 10 sellers in the United States?

14 MR. MANSFIELD: Object to the form of the
15 question.

16 A. I -- I haven't --

17 I haven't worked with those figures in several
18 years, so I -- I don't know.

19 Q. Is it your general understanding that ultra low
20 cigarettes are not the major sellers in the United
21 States market?

22 MR. WACHTELL: Objected to as vague and
23 ambiguous.

24 MR. MANSFIELD: Objected to as vague and
25 ambiguous.

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1 A. Not necessarily.

2 Q. Which is the biggest seller among the ultra low
3 cigarettes, to your knowledge, today?

4 A. Among the major sellers, probably Merit,
5 Carlton, Marlboro Ultra Lights, True, which is one of
6 ours. You know, they're all fairly successful
7 brands.

8 Q. Is True the best selling of the ultra lights
9 that Lorillard sells?

10 MR. MANSFIELD: You're talking about
11 today?

12 MR. GOTTLIEB: Yes.

13 A. I'm not sure if it is today. I --

14 Q. Was it during the time you were CEO of
15 Lorillard?

16 A. I believe so.

17 Q. How would you compare sales of Newport to sales
18 of True during the time that you were CEO?

19 A. Newport was larger.

20 Q. Slightly larger? By a factor of two? By a
21 factor of five? Could you specify?

22 MR. MANSFIELD: I object, vague and
23 ambiguous.

24 A. Probably by a factor of seven.

25 MR. MONICA: Are you --

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1 I don't know where you're at in your
2 questioning. Lunch is here, but if we're real close,
3 we'll just stick with it and get it done.

4 MR. GOTTLIEB: Without a promise, I would
5 think probably half an hour.

6 MR. WACHTELL: Why don't we start with --

7 MR. MONICA: I think we should just go for
8 it until we're done.

9 MR. WACHTELL: Are you okay?

10 THE WITNESS: Fine.

11 MR. MONICA: It's about 20 till now.

12 BY MR. GOTTLIEB:

13 Q. Would you take a look again at Exhibit 1267,
14 this time on page three, and in the middle of the
15 page it says "NICOTINE."

16 A. Uh-huh.

17 Q. Then it says, "PROVIDES UNIQUE TASTE & SENSORY
18 CHARACTERISTICS."

19 A. Uh-huh.

20 Q. Is it your understanding that there was a
21 particular taste --

22 THE REPORTER: Just a moment.

23 MR. WACHTELL: Did you finish the question?

24 Q. Is it your understanding that there is a
25 particular taste that smokers detect from nicotine?

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1 A. Well it has a taste and sensory characteristics
2 that are unique to -- to nicotine, that's my
3 understanding of it.

4 Q. Can you tell me how you arrived at that
5 understanding?

6 A. In -- you know, just in preparation for the
7 hearings and in discussions with -- with my research
8 people over the years.

9 Q. They told you that smokers liked the taste of
10 nicotine?

11 A. That they -- they enjoy cigarettes. One of the
12 reasons they enjoy cigarettes is because of the taste
13 or sensation from -- from nicotine.

14 Q. Do you know what kind of sensation nicotine
15 provides to smokers?

16 A. Not really.

17 Q. Do you know whether there are any other products
18 other than cigarettes which have nicotine flavoring?

19 A. I believe there are.

20 Q. Which would those products be?

21 A. Nicotine gum, nicotine patches.

22 Q. These would be products that would help people
23 quit smoking; is that correct?

24 MR. WACHTELL: Is that --

25 Object to the question as without foundation.

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1 A. I think one of the uses may be to quit smoking.

2 Q. Well other than nicotine patches and nicotine
3 gum, do you know of any other commercial product that
4 uses nicotine to provide a taste to the user?

5 A. Not really, but my understanding also is that
6 nicotine is a product that's found naturally in
7 tobacco that may not be found in -- may -- may be in
8 other -- in other argi -- agricultural products, I'm
9 not sure.

10 Q. Well nicotine can be removed from tobacco; is
11 that correct?

12 MR. MANSFIELD: Asked and answered.

13 MR. WACHTELL: That is asked and answered,
14 and I'm going to direct him not to answer it again.

15 MR. GOTTLIEB: You're telling him not to
16 answer that question?

17 MR. WACHTELL: He's already answered it.

18 MR. GOTTLIEB: Well he's the one who just
19 brought up the whole issue about it being a natural
20 product.

21 MR. WACHTELL: But that doesn't mean you
22 get a right to ask the question again.

23 MR. GOTTLIEB: Okay. You think that he
24 doesn't have an obligation to answer it again.
25 You've -- you've directed him not to answer.

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1 MR. WACHTELL: Yeah, I have. We can
2 stipulate it is possible to remove nicotine from
3 cigarettes.

4 BY MR. GOTTLIEB:

5 Q. Do you know of any instance in which Lorillard
6 has placed nicotine into a product other than
7 cigarettes?

8 MR. WACHTELL: Wait a minute.

9 A. I -- I --

10 MR. WACHTELL: Wait a minute. Wait a
11 minute. Is your question --

12 A. No, that's -- that I'm -- that I'm --

13 That I'm not touching with a barge pole.

14 MR. WACHTELL: If you are suggesting by
15 your question the premise that nic -- that Lorillard
16 places nicotine in cigarettes, --

17 MR. GOTTLIEB: I didn't say that.

18 MR. WACHTELL: -- that is highly
19 misleading.

20 Well when you say any product -- if you placed
21 it in any product other than cigarettes, your
22 question is susceptible to an interpretation, at
23 least, that you are suggesting that Lorillard has
24 placed nicotine in cigarettes. So I object to the
25 question as lacking foundation, highly misleading.

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1 Q. Putting cigarettes to a side, because we can
2 argue about whether or not Lorillard does that or has
3 the capability of doing it, but putting that to a
4 side --

5 A. You can argue about that, but I --

6 Q. I'm not going to argue with you about it right
7 now.

8 Do you know whether Lorillard has placed
9 nicotine into any product, not including cigarettes?

10 A. I -- I -- I don't know, but I can't imagine that
11 they would have.

12 Q. Continuing on the same page, also under the
13 heading of "NICOTINE," it states, "DE-NIC CIGARETTES
14 FAILED." Which cigarettes were you referring to
15 there?

16 MR. WACHTELL: That's been asked and
17 answered, but you can answer again.

18 A. I believe I was referring to Next.

19 Q. Any others?

20 A. I don't recall.

21 Q. It then states, "LLD" --

22 Does that stand for Lorillard?

23 A. Yes.

24 Q. -- "HAS NO CREDIBILITY ON NICOTINE RESEARCH."

25 Could you explain what you mean by the statement

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1 Lorillard has no credibility on nicotine research?

2 A. I believe that that would, if -- if I'm
3 remembering correctly, that, you know, any research
4 that Lorillard might try and do on nicotine would
5 have no credibility to the people that were
6 questioning me.

7 Q. Can you tell me why that would be?

8 A. Because we -- we believe that our -- that people
9 who were questioning us in Congress thought that the
10 tobacco companies were lying. Or some of the people
11 that were questioning us.

12 Q. On the same page, about three lines from the
13 bottom, and this is under the heading of "NICOTINE
14 LEVELS," is the statement, "IN LOW TAR CIGARETTES:
15 FILTERS," does it say "CONTROL TAR BETTER THAN
16 NICOTINE?" Did I read that correctly?

17 A. I believe that's read correctly.

18 Q. How did you come to that understanding?

19 A. This was in preparation for my testimony. It
20 was probably discussions with my lawyers and with Dr.
21 Spears, or through -- through my lawyers with Dr.
22 Spears.

23 Q. Do you know what there is about filters in low
24 tar cigarettes that make them control tar better than
25 nicotine?

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1 A. No, I don't.

2 Q. Do you have any understanding as to whether

3 Lorillard could build filters that control nicotine

4 as well as they can control tar?

5 A. I don't know.

6 Q. Did you ever ask anybody about that?

7 A. I don't recall asking.

8 Q. Do you know whether the Surgeon General has ever

9 stated that nicotine is addictive?

10 MR. WACHTELL: I don't think your

11 question --

12 I think you misspoke.

13 THE REPORTER: It's "do you know whether."

14 MR. WACHTELL: Is it "whether" or "what?"

15 You said "what."

16 MR. GOTTLIEB: It's "whether."

17 MR. WACHTELL: "Whether."

18 A. I believe he has.

19 Q. Do you know when he made that statement?

20 A. I don't recall which report specifically.

21 Q. Would you recall that it might be in 1988?

22 A. I -- I just answered you that I don't recall

23 which one.

24 Q. Do you remember hearing it at or about that

25 time?

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1 A. I -- I don't recall. I -- I know --

2 I know that I do recall that the Surgeon General
3 did say that nicotine is addictive. I don't recall
4 when.

5 Q. Did you read about that in the popular press?

6 A. I don't recall.

7 Q. Did you have any discussions with people at
8 Lorillard regarding that statement by the Surgeon
9 General that nicotine was addictive?

10 A. I don't remember whether I did or didn't.

11 Q. Do you believe the Surgeon General was correct
12 in that statement?

13 MR. MANSFIELD: I object to the form of the
14 question.

15 MR. WACHTELL: Object to the form of the
16 question. And you're going to have to define what
17 you mean by the word "addictive." Witness has
18 previously testified at length upon this in this
19 deposition that in his understanding of the word
20 "addictive," it is not. He -- the Attorney General
21 is using it in some other sense, but you --

22 MR. MURPHY: Surgeon General.

23 MR. WACHTELL: -- Surgeon General, but you
24 have to define your terms.

25 Q. Well the Surgeon General used the term

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1 "addictive." Do you believe in the way the Surgeon
2 General had used that term, he was incorrect?

3 MR. MANSFIELD: I object to the form of the
4 the question.

5 MR. WACHTELL: If you know.

6 A. I don't know.

7 MR. WACHTELL: If you know how the Surgeon
8 General used the word.

9 MR. REILLY: Why don't you show him the
10 report if you're going to ask him about how the
11 Surgeon General used it?

12 MR. GOTTLIEB: Because right now I wanted
13 to know what his understanding is based upon what he
14 has read.

15 MR. MANSFIELD: But that's not what you
16 asked. You asked about a definition as being used by
17 the Surgeon General without establishing the
18 foundation as to whether this witness knew what the
19 Surgeon General's definition was.

20 MR. WACHTELL: The Surgeon General
21 previously had said it was not addictive.

22 MR. GOTTLIEB: That was a different Surgeon
23 General in a different time period.

24 MR. WACHTELL: That's right. And a
25 different definition and that's the problem.

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1 BY MR. GOTTLIEB:

2 Q. Do you know whether ex-FDA Commissioner Kessler
3 has ever stated that cigarette smoking or nicotine is
4 addictive?

5 MR. WACHTELL: When you -- when you say
6 "stated," you mean stated the person's opinion?

7 MR. GOTTLIEB: Made that statement.

8 MR. WACHTELL: Okay. Made the statement.

9 Well very well. I'll --

10 A. I believe that he has made that statement.

11 Q. Did you --

12 Do you know when he made that statement?

13 A. I don't know exactly when.

14 Q. Approximately the year.

15 A. I'm not sure if it was late '80s, early '90s.

16 Q. Was it a time -- during a time that you were CEO
17 of Lorillard?

18 A. I'm not sure when he first made the statement,
19 but he made that statement during the time that I was
20 CEO of Lorillard.

21 Q. When you heard that he had made that statement,
22 did you have any discussions with Lorillard employees
23 regarding whether or not nicotine was addictive?

24 A. I may or may not have. I don't recall.

25 Q. We've used the word "addictive" in relation to

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1 nicotine and cigarette smoking. If I had changed the
2 word to "dependence-producing," would that -- would
3 that change your testimony at all?

4 MR. MANSFIELD: I object to the form of the
5 question. It's an incomprehensible question.

6 MR. WACHTELL: Change his testimony as to
7 what? Which testimony and which questions?

8 MR. GOTTLIEB: Let me rephrase the
9 question.

10 BY MR. GOTTLIEB:

11 Q. Do you believe that nicotine is dependence-
12 producing?

13 MR. WACHTELL: Do you know what the words
14 mean? How do you define the words?

15 A. I don't know what the words mean.

16 Q. Do you leave --

17 Do you believe that nicotine is habit-forming?

18 MR. MANSFIELD: Are you asking him --

19 A. I don't --

20 I don't know what your definition of the words
21 "habit forming" are.

22 Q. As the word is used in ordinary English
23 language.

24 MR. MANSFIELD: I -- I object to the form
25 of the question.

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1 Q. In everyday speech.

2 MR. WACHTELL: If you have an
3 understanding, you can answer. And if you don't have
4 an understanding, tell Mr. Gottlieb you don't have an
5 understanding.

6 A. I don't have an understanding of your -- your
7 term "habit forming." I will tell you that I believe
8 that smoking is -- can be habit-forming, but I'm not
9 sure if it's nicotine or it's something else that --
10 that forms the habit. I wouldn't characterize it
11 that way.

12 Q. Do you know whether nicotine contributes to
13 causing the habit, even if it's not the sole cause?

14 A. I don't know.

15 MR. MANSFIELD: Asking him -- I object.
16 Are you asking for an expert opinion on the role of
17 nicotine in what you claim to be habit-forming
18 exercise?

19 MR. GOTTLIEB: I'm asking him his knowledge
20 as a person who had been CEO of Lorillard.

21 MR. WACHTELL: He's answered the question.

22 Q. Would it be fair to say that when the Surgeon
23 General made the statement that nicotine is
24 addictive, you didn't necessarily accept that
25 statement as fact?

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1 MR. MANSFIELD: I object to the form of the
2 question. I think it is confusing, vague and
3 ambiguous.

4 MR. WACHTELL: Again, you -- you can't ask
5 these questions except in context as to how you use
6 the word "addictive." Or I mean -- I also --

7 When you say "fact," I mean are you suggesting
8 that in our society, that one is not entitled to
9 question the opinion of a government officer?

10 MR. GOTTLIEB: Not at all. I'm simply
11 trying to find out how he reacted to that statement
12 by the Surgeon General.

13 MR. WACHTELL: That wasn't your question.
14 You didn't ask him how he reacted. If you want to
15 ask him that, ask him that.

16 BY MR. GOTTLIEB:

17 Q. When you heard that the Surgeon General made a
18 statement to the effect that nicotine was addictive,
19 did you believe that that statement was a correct
20 statement by the Surgeon General?

21 MR. WACHTELL: Object to the form of the
22 question --

23 MR. MANSFIELD: Object to the form of the
24 question.

25 MR. WACHTELL: -- as vague and ambiguous

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1 and lacking foundation. You may answer.

2 A. I don't --

3 MR. MANSFIELD: Also add -- add to the
4 objection, again we have a problem here of the
5 definition of "addiction."

6 MR. WACHTELL: That's my -- that's my vague
7 and ambiguous and lacks foundation.

8 MR. MANSFIELD: Maybe you can put a better
9 question, Lou, but as to how the Surgeon General used
10 the term "addiction" versus what this witness
11 understood isn't going to lead you to anything that
12 would be relevant for this case.

13 A. I don't recall when I first heard the Surgeon
14 General make that statement, but based on my
15 definition of "addiction," it did not fit with -- I
16 did not believe that he was correct.

17 Q. You're not making that statement as a
18 scientist. You're making that statement as a person
19 who has knowledge about cigarettes, in general, but
20 not as a scientist; is that correct?

21 A. No, I'm -- I'm -- no, I'm --

22 MR. WACHTELL: No, the witness said -- hold
23 it. The witness testified yesterday, he was asked
24 and testified yesterday as the basis for his
25 understanding of the classic definition of

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1 "addiction," and it didn't conform to what you're
2 now putting in his mouth.

3 MR. GOTTLIEB: I think that has nothing to
4 do with my question.

5 Could you read back my last question?

6 (Record read by the court reporter.)

7 MR. WACHTELL: No. That is misleading and
8 it mischaracterizes the witness's prior testimony.
9 The witness previously testified s to his
10 understanding, not particularly limited to
11 cigarettes, of what "addiction" meant in the classic
12 definition.

13 MR. FINZEN: I thought we had an agreement
14 that when I asked the court reporter to read back the
15 question, you will not restate your objection in
16 detail --

17 MR. WACHTELL: I didn't -- I didn't --

18 MR. GOTTLIEB: -- and cause the -- this
19 deposition to last an unnecessary length of time.

20 MR. WACHTELL: Leo, you're right, but I
21 did --

22 MR. GOTTLIEB: Good.

23 MR. WACHTELL: When I had it read back, I
24 realized that I had not properly articulated the
25 entirety of my objection, and that's why I added to

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1 it.

2 MR. GOTTLIEB: Why don't we try it again.

3 Will the court reporter please read my question back
4 again.

5 (Record read by the court reporter.)

6 A. I'm making the -- the statement based on my
7 understanding of addiction, based on the fact that
8 I'm not a scientist and I'm not a cigarette
9 manufacturing person, that -- basically I'm a manager
10 of a company.

11 Q. Of a cigarette company.

12 A. In this case a cigarette company.

13 MR. WACHTELL: He was. Not now.

14 Q. And when FDA Commissioner -- ex-FDA Commissioner
15 Kessler also used the word "addiction," you felt that
16 you didn't need to accept his definition of
17 "addiction;" did you?

18 MR. MANSFIELD: Object to the form of the
19 question.

20 A. I felt that, based on my understanding and
21 definition of "addiction," that he and I disagreed.

22 Q. Okay. And just as you have the right to
23 disagree with Dr. Kessler or the Surgeon General,
24 would you agree that all the smokers out there in the
25 United States have the same right to disagree with

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1 the statements regarding addiction made by Dr.

2 Kessler or by the U.S. Surgeon General?

3 A. I believe that each person is entitled to make
4 up his or her own opinion.

5 Q. On this issue.

6 A. On this issue. On many issues.

7 Q. Okay. Do you know whether different types of
8 tobacco have different levels of nicotine in them?

9 MR. WACHTELL: Wasn't that testified to
10 yesterday?

11 MR. GOTTLIEB: I don't think so.

12 MR. WACHTELL: I think it was.

13 MR. MANSFIELD: It was asked and answered.

14 MR. WACHTELL: Absolutely it was testified
15 to yesterday.

16 A. Do different types of tobaccos have different --

17 Q. Levels of nicotine.

18 A. They have different levels of tar and nicotine,
19 and I'm sure a lot of other things.

20 Q. Do you know whether Lorillard purchases tobacco
21 that contains higher levels of nicotine than it had
22 purchased, let's say, 20 years ago?

23 MR. MANSFIELD: I object to the form of the
24 question. First, what's the timeframe?

25 MR. GOTTLIEB: Well let's compare the 1990s

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1 when you were CEO to, let's say, the 1970s.

2 A. I have no idea.

3 Q. Do you know whether Lorillard pays more -- and
4 this is during the time you were CEO -- for tobacco
5 that contains high nicotine levels as compared to
6 tobacco that contains low nicotine levels?

7 A. I don't know, but I would seriously doubt it.

8 Q. In the last two days you have seen a number of
9 documents that you've never seen before; is that
10 correct?

11 A. That's correct.

12 Q. And many of these documents relate to issues of
13 nicotine and addiction; is that correct?

14 MR. WACHTELL: I don't know that I can
15 accept that characterization.

16 MR. MANSFIELD: I object, the documents
17 speak for themselves. They've been admitted for
18 purposes of identification in this deposition.

19 Q. You --

20 You've seen these documents, you've read parts
21 of them, not the entire documents. Would you agree
22 that these documents are -- not all of them, but many
23 of them relate to issues of nicotine and addiction?

24 MR. WACHTELL: I'm not sure that's true.

25 MR. MANSFIELD: Objection to the form of

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1 the question.

2 A. No, I wouldn't --

3 Many of them use the word nicotine in one way or
4 another, but I wouldn't characterize them as a group
5 in any particular way or fashion. I would -- I would
6 say that they -- they all use the word nicotine, or
7 that a lot of them use the word nicotine in them.

8 MR. WACHTELL: Lou, if you have a
9 particular document that you want to show the witness
10 and ask him a question that has not previously been
11 asked, why don't you please go and proceed that way.

12 Q. Would you agree that many of these documents
13 pertain to testing or experiments done by Lorillard
14 in relation to nicotine?

15 MR. MANSFIELD: Object to the form of the
16 question.

17 MR. WACHTELL: I'm going to direct the
18 witness not to answer that question. If you have a
19 particular document you want to put in front of the
20 witness and ask him a particular question, I will
21 certainly let him answer it if it has not already
22 been asked, but I'm not going to let him testify
23 generically to whole groups of documents that are not
24 in front of him.

25 MR. GOTTLIEB: Are you accepting your

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1 counsel's instructions not to answer the question?

2 THE WITNESS: Yes.

3 MR. MANSFIELD: Let me add as an objection

4 for the record: The documents speak for themselves.

5 If you want the witness to go through and to

6 characterize documents which your question itself

7 agrees he has never seen before, I'm not quite sure

8 that that would read -- lead to any reasonable --

9 it's not a reasonably calculated manner to get to

10 admissible evidence.

11 MR. GOTTLIEB: Why don't we take a

12 five-minute break. Off the record.

13 THE REPORTER: Off the record, please.

14 (Recess taken.)

15 BY MR. GOTTLIEB:

16 Q. Please take a look at Exhibit 1203.

17 MR. WACHTELL: Which is 1203?

18 MR. GOTTLIEB: Lorillard Research Center,

19 Greensboro.

20 A. Where is my -- my pile?

21 Q. I had to use that pile.

22 A. How can I look at it then?

23 Q. I believe you -- there are several other copies

24 around.

25 MR. WACHTELL: We'll try to find you a

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1 copy.

2 MR. MONICA: Exhibit 1203?

3 MR. WACHTELL: Yeah.

4 MR. MONICA: I'm getting close.

5 (Discussion off the stenographic record.)

6 MR. GOTTLIEB: Also find 1201 and 1204;

7 that might speed things up.

8 MR. MONICA: Here's 1201.

9 MR. WACHTELL: All right, can we ask him
10 about 1201 first, because we've got that?

11 MR. GOTTLIEB: That will be fine.

12 BY MR. GOTTLIEB:

13 Q. On the document that we have marked as Exhibit
14 1201, would you look at page two, please. And this
15 document talks about nicotine addition. You see that
16 in the middle of the page?

17 A. Yes.

18 Q. And the title of this document is "NICOTINE
19 AUGMENTATION PROJECT." That's on the first page.

20 A. I see that.

21 Q. Would you agree that this is a document that
22 discusses nicotine and tests that were done by
23 Lorillard regarding nicotine?

24 MR. WACHTELL: No, I think that's
25 misleading.

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1 A. I -- I -- I don't know what I would characterize
2 this as. The first time I saw it was yesterday.

3 MR. WACHTELL: Indeed, the document does
4 nothing of the kind. There may be other documents
5 that do that, but this one certainly doesn't.

6 MR. GOTTLIEB: Okay.

7 Q. Would you agree that this document contains a
8 discussion by research people from Lorillard
9 regarding the addition of nicotine to cigarettes?

10 MR. MANSFIELD: I object to the form of the
11 question.

12 MR. WACHTELL: Lou, this document on its
13 face is a proposal for certain research be done. I
14 mean there's no mystery about it. You can read
15 it --

16 MR. GOTTLIEB: Exactly.

17 MR. WACHTELL: -- and see that.

18 MR. GOTTLIEB: And -- and --

19 MR. WACHTELL: But I mean to ask this
20 witness to read a document that he's never had any --
21 seen before, and ask you to characterize it for him
22 is just a waste of all of our time.

23 MR. GOTTLIEB: I'm just trying to use --

24 MR. WACHTELL: Besides, this was gone over
25 yesterday.

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1 MR. GOTTLIEB: I'm trying to use a very
2 broad characterization which I thought would be
3 unobjectionable, but if you have an objection, we
4 have to look at the documents.

5 MR. MANSFIELD: I -- I object to the form
6 of the question. The document speaks for itself. It
7 should be characterized as what it says. You have an
8 exhibit number, it's in this record for
9 identification purposes. It says what it says.

10 MR. WACHTELL: Now the witness was
11 legitimately asked yesterday whether he had seen it,
12 whether he knew about it, whether he knew about the
13 project, et cetera, et cetera. That -- those were
14 legitimate questions from which one could take off
15 the piece of paper. But just ask the piece -- the
16 witness, who's never seen this piece of paper, to
17 attempt to interpret it I don't think is legitimate.

18 MR. GOTTLIEB: Well I'm trying to
19 characterize a number of these documents in a simple
20 way.

21 MR. WACHTELL: Well proceed and maybe we
22 can get -- go forward. I'm really not trying to
23 hamper you, but I -- you -- you really have to ask
24 what are proper questions.

25 Q. It is clear from where I'm sitting that these

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1 documents discuss nicotine. Would you agree with
2 that?

3 MR. WACHTELL: I'll let him answer that
4 question.

5 MR. MANSFIELD: Same objection.

6 A. A great number of the documents contain the word
7 "nicotine" in them.

8 Q. And would you agree that they -- that some of
9 these documents -- and we can go over the individual
10 ones if you'd like -- talk about proposed research or
11 actual research conducted by Lorillard on the subject
12 of nicotine?

13 A. I'm not sure I would make that -- that
14 characterization.

15 MR. WACHTELL: I think -- I think he'd have
16 to look at them to see. This one appears to involve
17 proposed research, the one that's in front of him.

18 MR. GOTTLIEB: That was my --

19 MR. WACHTELL: I can read that.

20 MR. GOTTLIEB: That was my point.

21 MR. WACHTELL: I don't know it, I'm just
22 reading. I don't know it, I'm just reading it, just
23 as you're reading it and he's reading it.

24 MR. GOTTLIEB: Well in order to ask a
25 question I need to have a basis, and the basis is

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1 that these documents are on that subject.

2 MR. MANSFIELD: But the problem, Lou, is
3 that this witness cannot authenticate these
4 documents, did not authenticate these documents, and
5 any question that you ask that presupposes he can
6 authenticate it simply is improper. The documents
7 say what they say.

8 MR. GOTTLIEB: I did not ask him to
9 authenticate it.

10 MR. MANSFIELD: The documents say what they
11 say. You can read them as well as he can. He said
12 that he had never seen them before.

13 MR. GOTTLIEB: That's why I didn't ask him
14 to authenticate it.

15 MR. WACHTELL: Well what's your question,
16 to agree that it mentions nicotine? I mean how does
17 that move the ball forward?

18 Q. Based upon the documents that you have seen in
19 the past two days, many of which you said you've
20 never seen before, are there any steps that you plan
21 to take, any questions that you plan to ask of
22 Lorillard employees on the subject of nicotine and
23 addiction?

24 MR. MANSFIELD: I object to the form of the
25 question. Are you asking now, today?

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1 MR. GOTTLIEB: Yes.

2 A. I don't know.

3 Q. Are there --

4 Based upon the documents that you have seen in
5 the last two days, are there any questions that you
6 would have for Lorillard employees on the subject of
7 cigarette smoking and health?

8 MR. MANSFIELD: Object to the form of the
9 question. The questions that he would have for what
10 purpose?

11 MR. WACHTELL: I think it's hopelessly
12 vague and ambiguous. And also the witness --

13 Well, I'll -- I'll -- I'll stop there.

14 A. I -- I don't know at this point.

15 Q. At this point in time, do you have an intention
16 to read in detail the entire documents that were
17 presented to you in the last two days?

18 MR. MANSFIELD: I object to the form of the
19 question.

20 A. I -- I plan to review the transcript to make
21 sure that everything I said is honest and truthful.
22 If it incorporates reading these documents, I'm sure
23 that, once I've read them, there -- there will be
24 questions I may have. But beyond that, I -- I don't
25 know.

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1 Q. Okay. I understand that you're planning to read
2 the transcript. At this point in time as we sit here
3 right now, do you also have an intention to read the
4 underlying documents that were introduced?

5 MR. MANSFIELD: Well it would be difficult
6 to read the transcript without reading the exhibits,
7 because we spent two days asking questions about the
8 exhibits.

9 MR. GOTTLIEB: Well one could easily sit
10 down with the transcript and read that and not look
11 at the exhibits.

12 MR. WACHTELL: He just answered you. You
13 just answered that and said that in connection with
14 reading the transcript, he would intend to look at
15 the relevant portions of the exhibits. He said that
16 a minute ago.

17 MR. GOTTLIEB: What I'm trying to find out
18 is: Does he intend to read the entire exhibits, as
19 opposed to the one page or the paragraph that may
20 have been read in the record.

21 MR. WACHTELL: Would you -- would you tell
22 me, just for my own enlightenment, what the relevance
23 is whether this witness does or does not intend to
24 read the entirety of documents that go back to the
25 1960s and 1970s at this point in time?

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1 MR. GOTTLIEB: No, I -- I don't plan to
2 answer your questions at this point in time.

3 Would -- can you answer my question, please?

4 A. I don't -- I don't know what my intentions are.
5 You're obviously trying to get me -- get me to make
6 some sort of media bite here for you. I'm -- you
7 know, I've been through two days of fairly grueling
8 exercise with -- with you and several other lawyers,
9 and right now my -- my intention is to finish up this
10 deposition, and I can't tell you what I'm going to do
11 next week.

12 Q. So at this point in time you do not have an
13 intention to read these exhibits in full.

14 A. That's not --

15 MR. MANSFIELD: Object to the form of the
16 question.

17 A. That's not what I said.

18 MR. MANSFIELD: That's not what the witness
19 said. It mischaracterizes what the witness said.
20 It's an unfair question to put.

21 Q. Well you said that you --

22 I believe you were saying you have not decided
23 one way or the other --

24 MR. WACHTELL: Well this witness -- this
25 witness --

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1 MR. GOTTLIEB: -- whether you're going to
2 read these exhibits in full.

3 MR. WACHTELL: Some of these papers are
4 very highly scientific papers with scientific jargon
5 in them, and this witness has also testified
6 previously that he's not a scientist, this is not his
7 area of expertise, it is not an area he focussed on,
8 it is not an area he knows anything about.

9 MR. GOTTLIEB: And you are coaching the
10 witness.

11 MR. WACHTELL: No, I'm not coaching the
12 witness. I'm repeating --

13 How can I coach him when I give you his
14 testimony?

15 You know, Lou, if you really don't have anything
16 else, can we quit and have lunch and go home?

17 MR. GOTTLIEB: Do you recall the last
18 question?

19 THE WITNESS: No, I don't.

20 MR. GOTTLIEB: Can you read it back,
21 please?

22 (Record read by the court reporter.)

23 Q. Do you have a present intention to read these
24 documents in full?

25 MR. MANSFIELD: And asked and answered.

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1 MR. WACHTELL: Asked and answered. I'm
2 going to direct the witness not to answer it again.
3 It's been asked and answered.

4 THE WITNESS: I will follow my attorney's
5 advice.

6 Q. In the area of attempts to reduce smoking by
7 youth, do you know whether raising the price of
8 cigarettes affects sales to youth?

9 MR. WACHTELL: By "know," do you mean does
10 he know for a fact? Does he have an opinion? What's
11 the question?

12 MR. GOTTLIEB: Is this an area that he has
13 knowledge based upon the time that he was working for
14 Lorillard.

15 A. I believe that raising the price of cigarettes
16 or any product has the effect of changing the demand
17 for the product. I don't know specifically whether
18 it would be different for younger adult smokers or
19 older adult smokers.

20 Q. Do you know if it would have a greater effect on
21 teenage smokers than on people who are over 18?

22 A. I do not know.

23 Q. If experts in the area would testify or would
24 state that price hikes in cigarettes would lead to
25 reduction in smoking by youth, would you support such

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1 price hikes in cigarettes?

2 MR. MANSFIELD: I object to the form of the
3 question. It's speculative, vague, ambiguous, it
4 assumes facts not in evidence, it lacks foundation.

5 MR. WACHTELL: I have another problem with
6 the question, or a couple of other problems in the
7 question, as -- as you know, there is presently on
8 the table a proposal for global resolution of all
9 sorts of tobacco issues, and included among that are
10 very, very major price hikes in cigarettes. So you
11 know that. And I also have a problem if you're going
12 to sit here talking about price hikes in cigarettes,
13 that there are representatives of more than one
14 tobacco company in the room, and I don't think it is
15 appropriate for this witness to be sitting here
16 talking about what he would or would not do in
17 prices, because next thing you know, you or some
18 other firm -- well already I understand a lawsuit was
19 filed yesterday charging that recent price hikes by
20 the cigarette companies was supposedly done by
21 collusion, and as a result, a violating of the
22 antitrust laws. So I'm just not going to let this
23 witness sit here and testify as to what any price
24 strategy for the future may be.

25 MR. GOTTLIEB: Are you directing the

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1 witness not to answer?

2 MR. WACHTELL: Yes.

3 MR. GOTTLIEB: Well that's about the fifth
4 question that you've directed the witness not to
5 answer.

6 MR. WACHTELL: Lou, you don't --

7 MR. GOTTLIEB: I certainly reserve my
8 right --

9 MR. WACHTELL: Lou, you can reserve your
10 right --

11 (Discussion off the stenographic record.)

12 MR. GOTTLIEB: -- to bring these issues up
13 with Judge Ramos and determine at some later point in
14 time whether or not my questions were appropriate and
15 whether or not your directions not to answer were
16 inappropriate.

17 MR. WACHTELL: Lou, that -- that --

18 Of course, that's your prerogative. But I mean
19 I really do not think, given the antitrust laws in
20 this nation about exchanging price information, that
21 it is appropriate for me to have this witness testify
22 when there's a representative of at least one other
23 tobacco company in the room and this transcript will
24 be available to all the other tobacco companies, of
25 anything that has to do with Lorillard's future

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1 pricing strategy and whether it would or would not
2 raise prices on this contingency or that contingency
3 is just a subject that is not an appropriate area of
4 inquiry.

5 MR. MANSFIELD: And let me add to that, it
6 also bears on no issue that exists in the Small
7 case.

8 MR. WACHTELL: Of course you can reserve
9 your right, but I think when you think about it
10 you'll realize that I'm correct.

11 MR. GOTTLIEB: Well as I said, I'm
12 reserving my right on that instruction and on the --
13 and on the prior instructions not to answer.

14 Beyond that, I have no further questions at this
15 time.

16 MR. WACHTELL: Great. Thank you very
17 much.

18 THE REPORTER: Off the record, please.

19 (Deposition concluded at 1:25 o'clock p.m.)

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1 C E R T I F I C A T E

2 I, Richard G. Stirewalt, hereby certify
3 that I am qualified as a verbatim shorthand reporter;
4 that I took in stenographic shorthand the testimony
5 of ANDREW H. TISCH at the time and place aforesaid;
6 and that the foregoing transcript consisting of pages
7 287 through 461 is a true and correct, full and
8 complete transcription of said shorthand notes, to
9 the best of my ability.

10 Dated at New York, New York, this 30th day
11 of September, 1997.

12

13

14

15 RICHARD G. STIREWALT

16 Registered Professional Reporter

17 Notary Public

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1 C E R T I F I C A T E

2 I, ANDREW H. TISCH, the deponent, hereby
3 certify that I have read the foregoing transcript
4 consisting of pages 287 through 461, and that said
5 transcript is a true and correct, full and complete
6 transcription of my deposition except:

7

8

9

10

11

12

13

14

15 ANDREW H. TISCH

16 Deponent

17

18 Sworn and subscribed to before me this day
19 of , 1997.

20

21

22

23 Notary Public

24

25 My commission expires .

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